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CURRENT EVENTS.

THE JACOB SHARP CASE.—We observe that there is some tendency to reaction in public sentiment in the Jacob Sharp Case. There is a strong and growing impression in the profession that, technically at least, he has had hard measure, that illegal and incompetent testimony was admitted against him, and upon a doubt on this point a stay of proceedings has been granted which will probably be followed by a new trial and, ultimately, by an acquittal.

There is a strong popular prejudice against what are commonly called purely technical defenses, and we presume that objections to illegal testimony would, outside of the profession, be classed among such defenses. We have no sympathy with views of this character. The law-making power has it all its own way in defining crime and prescribing modes of procedure, and measure and methods of punishment, and if, after the wisdom of the State has done its utmost, a loop-hole is found through which a culprit escapes, we do not see that anybody has a right to be particularly indignant. It is necessary for the protection of the innocent that there should be rules of procedure and evidence; it is of the essence of rules that they should be enforced and obeyed, and all persons accused of crime are entitled to whatever benefit may accrue to them from such enforcement. We observe that, in commenting on this case and upon the present phase of it, the *Albany Law Journal*, after remarking that the evidence against Sharp (upon which, of course, the popular persuasion of his guilt was founded), was hardly circumstantial, indeed merely inferential, proceeds to say: "The strongest inference against Sharp is one which the law forbids the jury to entertain, namely, his omission to proffer himself as a witness and deny his guilt." In other words, the circumstance which most strongly persuaded the people of Sharp's guilt was one, equally well known to the jury, which they could not lawfully consider. Who knows whether they did actually consider it, or whether they could by any possibility have abstained from c nsidering it? The jury after all are but a segment of the people, of like passions, feelings, habits of mind to those of other men, and how or why a higher discretion or more implicit obedience to the laws of ratiocination should be expected of them than of other men we cannot conceive.

We commend this view of the Sharp Case to the *Albany Law Journal* and to all others who approve the very absurd law which puts to every person accused of crime the election to testify as a witness, under the penalty of being regarded as guilty if he does not, and perjured if he does.

Sympathy with the under dog in a fight is certainly a magnanimous sentiment, but there may be some doubt whether it is strictly applicable in the case under consideration, but there *is* a rule equally venerable and worthy of all acceptation which is singularly appropriate, and that is, "a fair field and no favor."

ADDRESS OF THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION.—The address of Mr. Thomas J. Semmes, of Louisiana, President of the American Bar Association, is a singularly complete and satisfactory document. Under the constitution of the association this address is required to contain, besides appropriate references to other matters of interest to the profession, a full statement of all the legislation of general application and interest of the federal and of all the State legislatures. This task Mr. Semmes has performed in an especially faithful and thorough manner. A careful perusal of his address will place the reader fully abreast with all the legislation of the day.

He gives precedence of course to congressional legislation, and our limited space requires that we should confine ourselves to a brief summary of his statements on that subject. He gives a prominent place to the interstate commerce act, the most important act, not only to the legal profession, but to business interests of the country which congress has passed for many years. There is also an exhaustive sketch of the act regulating the removal of causes from State to federal

courts, an act designed to simplify and elucidate a subject which has now become complicated and perplexing. Another statute of interest to lawyers is that which enlarges the jurisdiction of the court of claims over demands against the United States. The purport of this act is fully stated, and the circuit and district courts are vested with jurisdiction of these actions concurrent with the court of claims. The subject of marriage in the Territories and the District of Columbia is regulated by another act of congress, and polygamy is again made the subject of federal legislation. The substance of these enactments are very lucidly set forth in the address. Other acts of congress upon subjects interesting to the profession are noticed and their purport stated by the author with clearness and precision. These qualities also characterize the portion of the address relating to t he legislation of the several States.

NOTES OF RECENT DECISIONS.

PENSION MONEY—EXEMPTION FROM EXECUTION—ATTACHMENT.—The Supreme Court of Pennsylvania has recently been placed under the necessity of deciding that the congress of the United States meant what it said in U. S. Rev. Stat. § 4747. The facts of the case[1] were that Rozelle received from the United States pension office $800 pension money, to which he was entitled. He intrusted it to Tillinghast for safe-keeping; Rhodes having a judgment against Rozelle for $100, issued an execution-attachment and summoned Tillinghast as garnishee. The question was, whether pension money in the hands of a bailee for safe-keeping was subject to exemption and attachment. The court held that it was not exempt. The following are the words of § 4747 U. S. Rev. Stat., under which the exemption is claimed:

"No sum of money due or to become due to any pensioner shall be liable to attachment, levy or seizure, by or under any legal or equitable process whatever, whether the same remains with the pension office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner."

It is rather hard for us to conceive how a claim of exemption could be sustained upon the authority of this section. Tillinghast was not the pension office of the United States, nor was he any officer or agent thereof, nor did he hold the money in the course of transmission from the pension office to the pensioner; on the contrary, he received the money from the pensioner himself.

The case was one of the first impression in Pennsylvania, but in Maine there has been a direct ruling which the court in the case under consideration has followed.[2] In that case Chief Justice Peters, of the supreme judicial court of that State, says:

"The question is, whether this provision furnishes any protection to, or exemption of, the money, after it comes into the pensioner's hands. A careful examination inclines us the conclusion that it does not. The meaning of the section seems to be that the protection is extended, so long as the money remains in the pension office, or its agencies, or is in course of transmission to the pensioner; it is money due or to become due that is protected by the law."[3]

[1] Rozelle v. Rhodes, S. C. Penn., April 18, 1887; 7 Cent. Rep. 656.

[2] Friend v. Garcelon, 77 Me. 25.

[3] Spelman v. Aldrich, 126 Mass. 113; Cavanaugh v. Smith, 84 Ind. 330; Faurote v. Carr (Ind.), 6 West. Rep. 281; State, Jardain v. Fairton, etc. Assn., 44 N. J. L. 376; Cranz v. White, 27 Kan. 319.

PERPETUATING TESTIMONY.

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It is sometimes desirable, in the interest of

justice, to take the testimony of witnesses when there is no suit pending, and one cannot be instituted by the party wishing to secure the evidence, and by reducing it to writing, in accordance with certain rules of the court or statutory regulations, preserve it for future use. This is denominated "perpetuating testimony" and is usually accomplished by exhibiting a bill in a court having equity jurisdiction, technically known as a bill *in perpetuam rei memoriam*, in which are fully set forth the matters regarding which the complainant desires to take the testimony of witnesses, and praying that a commission issue for that purpose.[1]

1. *Kind of Bills to Perpetuate Testimony.*—Bills to perpetuate testimony one of two kinds: (1) Those which are filed before suit is brought and when one cannot be presently instituted by the party filing the bill, technically known as bills *in perpetuam rei memoriam*; and (2) bills for the examination of witnesses *de bene esse*, which can be filed only when a suit is pending and there is danger of the loss of existing testimony by death of the witness or otherwise before the cause can be brought to a hearing and the rights of the parties determined. It is the object of this article to give the rules governing bills *in perpetuam rei memoriam*.

2. *Object.*—The object of all bills *in perpetuam rei memoriam* is to secure and preserve such testimony as may be in danger of being lost before the matter to which it relates can be made the subject of judicial investigation,[2] and thereby to assist courts of law, as well as to promote the ends of justice and prevent future litigation.[3]

3. *Necessity of such Proceeding.*—It has been said that bills of this kind are obviously indispensable for the purpose of public justice, as it may be utterly impossible for a party to bring his rights presently to a judicial decision; and unless in the intermediate time, he may perpetuate the proofs of those rights, they may be lost without any default on his part.[4] But although this jurisdiction seems to be indispensable for the purposes of public justice, it is open to grave objections, because it leads to a trial on written depositions which, in courts of common law, is regarded as much less favorable to the cause of justice and truth than the *viva voce* examination of witnesses. But what is a still more important objection to this kind of evidence is the fact that the disposition can never be used during the life of the witness, and in fact is not even published until after his death, and consequently whatever may have been the perjury committed it must go unpunished, and thus one powerful incentive to truthfulness is entirely swept away. Such testimony has the infirmity of not being given under the sanction of those penalties which the general policy of the law imposes upon the crime of perjury; and this is the reason why courts of equity will not entertain bills to perpetuate testimony unless it is manifestly necessary to prevent a failure of justice.[5]

4. *Origin of the Practice.*—The origin of this practice has been traced to the cannon law, which, it is said, taking hold of the consciences of men extended its right to all cases in which it was important, in the interest of justice, to register testimony which would otherwise be lost.[6]

5. *Statutory Regulations.*—There are statutes regulating the taking of testimony *in perpetuam rei memoriam*, as well as the examination of witnesses *de bene esse*, in the federal courts and most of the State courts.[7]

[1] Perpetuating testimony by bill *in perpetuam rei memoriam* has been defined as the taking of evidence provisionally, under the order of some competent court, and reducing it to writing, in order that it may be preserved and read in evidence in some suit or legal proceeding, to be thereafter instituted in the event that the witnesses whose testimony is taken shall be out of the country or beyond the jurisdiction of the court, ill or otherwise, unable to attend court and give evidence at the trial, or be dead. See 1 Bouv. L. Dict. (14th ed.) 326; 1 Whart. Ev. § 181.

[2] Cooper's Eq. Pl. 52; 2 Story Eq. Jur. (11th ed.) § 1505; Com. Dig., tit. "Chancery."

[3] Story Eq. Pl. (8th ed.) § 300; Barton's Suit in Eq. 53, 54.

[4] Story Eq. Jur. (11th ed.) § 1505. Similar means of perpetuating testimony which was in danger of being otherwise lost, was adopted by the civil law. Domat B. 3, tit. 6, § 3; Dig. Lib. 9, tit. 2, I. 40; Nov. 90, ch. 4; Gilb. For. Roman, ch. 7, pp. 118, 119; Mason v. Goodburne, Rep. *temp.* Finch, 391.

[5] Angell v. Angell, 1 Sim. & S. 83; Dorset v. Girdler, Prece. Ch. 531, 532; Cann v. Cann, 1 P. Wms. 723, 729; 1 Mod. Pr. Ch. 152, 153.

[6] Ch. 5, X ut. *lite non cont.*; Bockmer, *n.* 4; 8 Toullier, *n.* 22; Co. 34, 41, 43, X. De test. (ii. 20); 2 Bouv. L. Dic. (14th ed.) 326; 1 Whart. Ev. § 181.

[7] See U. S. Rev. Stat. § 866; Maine Rev. Stat. ch. 170, §§ 26, 27 and 28; also Maine Stat. 1821, ch. 101, § 4; Ocean Ins. Co. v. Bilger, 72 Me. 469; Winslow v. Masher, 19 Me. 151; Mass. Gen. Stats. ch. 131; §§ 54-58; India Mut. Ins. Co. v. Bilger, 132 Mass. 171; Virginia act 1849, 666, § 34. As to former practice in

In New York and some of the other States, bills to perpetuate testimony are seldom resorted to, for the reason that the legislature has provided a much cheaper and more expeditious method of proceeding to accomplish the same object.[8] Before the deposition of a witness will be taken *in perpetuam* it must be made to satisfactorily appear that the object is in good faith to perpetuate testimony, and not simply to fish for evidence to be used against the witness, or for other purposes.[9] Courts will not tolerate fishing for testimony in this manner.[10]

6. *When the Bills Lies.*—A bill to preserve testimony *in perpetuam* will lie where the subject-matter is likely to be litigated in the future, but cannot be made the subject of immediate judicial investigation, and there is testimony in existence which is in danger of being lost before the matter to which it relates can be brought to a trial; in order to prevent the hardship which might occur to the party from an investigation at a remote period when he was deprived of his evidence by the death or removal of his witness.[11] And this is true whether the title or claim is to real estate or personal property, or to mere personal demands; and whether the testimony is to be used in support of an action, or as matter of defense to repel it.[12] In order to be preserved such testimony must be of an ephemoral character, and this rule applies not only to witnesses, who may die at any time, and whose testimony cannot be otherwise produced, but also to all proofs equally ephemoral.[13] But such a bill can be maintained only when a present suit cannot be brought.[14]

In every case in which the complainant has a vested interest, however small or contingent, in a matter likely to become the subject of litigation, which cannot be investigated in a court of law or equity, either because of his inability from legal causes to bring a suit, or having sued, is prevented from proceeding by the act of the other party, and his interests may be endangered by the loss of the testimony, he is entitled to have such testimony perpetuated.[15]

A bill *in perpetuam* will be granted in cases of private penalty or forfeiture without waiving it where it may be waived, or in cases of waste or other forfeiture of a lease, and in cases of public penalties;[16] but will not be granted after judgment to preserve and perpetuate testimony which the party might lose by the death or absence of the witnesses, in the event of a reversal of the judgment and a new trial being ordered.[17] A bill to perpetuate testimony lies against a *bona fide* purchaser.[18]

(*a.*) *The Commission.*—Though the issuance of the commission to examine witnesses *in perpetuam* is usually granted as a matter of course, yet it does not issue as a strict right,[19] and the court may impose such terms as to it shall seem just.[20] In New York, and probably in most of the other States, the commission should be sealed,[21] and should contain the names of the witnesses.[22] A commission issued under a statute will be sufficient if it contains the substance of what is provided for in that statute.[23]

(*b.*) *The Order.*—The decretal order of

Virginia, see Smith v. Grosjean, 1 Patt. & H.(Va.) 109.

[8] N. Y. Rev. Stat. 398, art. 5 of tit. 3, ch. 7, pt. 3. The New York Code containing no provisions respecting bills to perpetuate testimony, the provisions of the Rev. Stat. are still in force, and where these afford an insufficient remedy, the party may still have recourse to a bill to perpetuate testimony. 2 Barb. Ch. Pr. (2d ed.) 144.

[9] *In re* Kip, 1 Paige Ch. 601, 608; Paton v. Westervelt, 5 How. Pr. 399.

[10] Booker v. Booker, 20 Ga. 777.

[11] Angell v. Angell, 1 Sim. & S. 83, 89; Mitf. & Tyl. Pl. & Pr. in Eq. 241. See also Hall v. Stout, 4 Del. Ch. 269. The New York & Baltimore Coffee Polishing Co. v. The New York Coffee Polishing Co., 20 Blatchf. C. C. 174; s. c., 62 How. Pr. 485.

[12] Suffolk v. Green, 1 Atk. 450.

[13] 1 Whart. Ev. § 181. The cannon law recognizes, in addition, the right of a party who has interests dependent upon a writing in process of decay or obliteration, to have such writing judicially perpetuated by exemplification. Ch. 4, X. ii, 6.

[14] See 2 Barb. Ch. Pr. (2d ed.) 145; Cooper Eq. Pl. 57; Story Eq. Pl. (8th ed.) §§ 303, 307; 2 Story Eq. Jur. (11th ed.) §§ 1508, 1513.

[15] Booker v. Booker, 20 Ga. 777; Lubes Eq. Pl. 134; 1 Smith Ch. Pr. 484.

[16] Suffolk v. Green, 1 Atk. 450; Jeremy on Eq. Jurisd. B. 2, § 1, pp. 266, 267, § 2, pp. 277, 278; Story Eq. Pl. (8th ed.) § 665; 2 Story Eq. Jur. (11th ed.) §§ 1494, 1509; Starkie Ev. (10th ed.) 428; 2 Bl. Com. 450.

[17] McColl v. Sun Mut. Ins. Co., 34 N. Y. Super. Ct. Rep. 310.

[18] Dursley v. Fitzhardinge, 6 Ves. 263, 264; Gordon v. Close, 2 Bro. Parl. Cas. 473, 477, 479.

[19] Ring v. Mott, 2 Sandf. 683.

[20] See Clayton v. Yarrington, 16 Abb. Pr. 278 *n*; Ablon v. Barbery, 1 N. Y. Leg. Obs. 154.

[21] Ford v. Williams, 24 N. Y. 359; Tracy v. Suydam, 30 Barb. 110; Whitney v. Wyncoop, 4 Abb. Pr. 370.

[22] Renwick v. Renwick, 10 Paige Ch. 420.

[23] Hall v. Barton, 25 Barb. 274.

the court granting a commission to take testimony, directs that the deposition, when taken, shall remain to perpetuate the memory thereof, and to be used as there shall be occasion, in case of the death or absence of the witnesses or their inability to attend the trial.[24] It must be drawn up in writing, naming the commission, and also the witnesses, in all cases where their names can be ascertained.[25]

7. *What Bill Must Show.*—In order to be able to maintain a bill *in perpetuam* it is requisite that the bill state on its face all the material facts which are necessary to confer jurisdiction. It must show that a suit at law cannot be brought by the party filing the bill;[26] or that before the facts can be investigated in a court of law the evidence of a material witness is liable to be lost by his death or departure from the country.[27] It must show that the matters touching which the plaintiff is desirous of giving evidence, so that it may point the proper interrogatories on both sides to the true merits of the controversy, and must show that he has some interest in the subject.[28]

The bill must, in the first place, state the subject-matter touching which the plaintiff is desirous of taking testimony. Thus if the object of the bill is to perpetuate the evidence of witnesses as to facts *in pais*, it is not sufficient to state generally that the witnesses can give evidence to certain facts, but the bill must state especially what those facts are.[29] If the object is to perpetuate the testimony of witnesses to a deed to real estate, the deed should be properly described, and the names of the witnesses who are to prove the same set forth.[30]

Where the bill seeks to perpetuate the testimony of witnesses to a will, it should set forth the whole will in *hæc verbæ*.[31] Where any particular right is claimed it must be specifically and sufficiently set forth.[32] And it has been held that where a bill *in perpetuam* has been filed, the examination of the witnesses completed and the commission closed, the plaintiff cannot file a supplemental bill to perpetuate the testimony of witnesses, on the ground of facts discovered since the filing of the original bill, without stating what those facts are.[33]

Ordinarily the bill must set out that the facts to which the testimony relates cannot be immediately investigated in a court of law; or if they can, that the sole right of action belongs to the opposite party; or if suit has been brought, that the opposite party has interposed obstacles—such as an injunction—to prevent its being brought to a determination.[34] The bill will be demurrable if it fails to state that the matter cannot be made the subject of immediate investigation;[35] because where the plaintiff is entitled to bring an action he is at most only entitled to a commission, under given circumstances, to examine witnesses *de bene esse*.[36]

Care should be taken in drawing a bill of this kind not to mix up with it other matters which may require very different decretal orders;[37] otherwise the bill will be open to demurrer.[38]

As the object of the exercise of this jurisdiction by courts having equity powers is to assist courts of law, and by preserving evidence to prevent future litigations, there are few cases in which the courts will decline to exercise it;[39] and demurrers to bills seeking its aid will seldom lie.[40] Thus where a bill sought a discovery, prayed relief, and asked to perpetuate testimony, the court held that

[24] Mason v. Goodburne, Rep. *temp.* Finch, 391, 392.

[25] Wright v. Jessup, 3 Duer (N. Y.), 642. An order by a judge out of court in which the witnesses are not named, is said to be of doubtful regularity. Renwick v. Renwick, 10 Paige Ch. 420. But it seems that if the order is made by the court they have power to dispense with this general rule. Nicol v. Alison, 10 Q. B. 1006.

[26] Cox v. Colley, 1 Dick. 55; Dew v. Clarke, 1 Sim. & S. 114; Cooper Eq. Pl. 57.

[27] Mitf. & Tyl. Pl. & Pr. in Eq. 150.

[28] Mason v. Goodburne, Rep. *temp.* Finch, 391; Smith v. Attorney-General, cited in 6 Ves. 260.

[29] Knight v. Knight, 4 Madd. 8, 10.

[30] See Mason v. Goodburne, Rep. *temp.* Finch, 391.

[31] Wyatt Pr. Reg. 74; Story Eq. Pl. (8th ed.) § 305.

[32] See Casset v. Mitton, 1 Ves. Jr. 449; S. C., 3 Bro. Ch. 481.

[33] Knight v. Knight, 4 Madd. 1, 10.

[34] Booker v. Booker, 20 Ga. 777. See Commonwealth v. Stone, Thach. C. C. (Mass.) 604; Smith v. Grosjean, 1 Patt. & H. (Va.) 109; North v. Gray, 1 Dick. 14; Cox v. Colley, 1 Dick. 55; Dorset v. Girdler, Prece. Ch. 530; Story Eq. Pl. (8th ed.) § 303; 1 Whart. Ev. § 182.

[35] Angell v. Angell, 1 Sim. & S. 89; Dew v. Clarke, 1 Sim. & S. 114.

[36] Angell v. Angell, 1 Sim. & S. 90.

[37] Dew v. Clarke, 1 Sim. & S. 114.

[38] Story Eq. Pl. (8th ed.) § 306.

[39] Mitf. & Tyl. Pl. & Pr. in Eq. 241.

[40] Suffolk v. Green, 1 Atk. 451; Phillips v. Carew, 1 P. Wms. 117; Tirrell v. Co. 1 Roll Abr. 383; Mendis v. Barnard, 1 Dick. 65; Dursley v. Fitzhardinge, 6 Ves. 251-256. But see Belfast v. Chichester, 2 Jac. & W. 439.

although the defendant might demur to the discovery sought and the relief prayed, that he could not demur to so much of the bills as sought to perpetuate the testimony of witnesses.[41] But where the case made by the bill appears to be such that the jurisdiction of the court does not arise—thus, for instance, if the matter to which the required testimony is alleged to relate can be immediately investigated in a court of law, and the witnesses reside within the jurisdiction of the court—the demurrer will lie.[42]

(*a.*) *Plaintiff's Interest.*—The bill should show that the plaintiff has some vested interest in the subject-matter, which may be endangered if the testimony in support of it be lost, for unless he has some interest he cannot maintain the bill.[43]

It has been said that the court will not protect every interest, by perpetuating the evidence sustaining it. Thus where the interest is such an one as may be immediately barred by the party against whom the bill is brought. the court will not sustain the bill, for the very sufficient reason that it would be a fruitless exercise of power.[44]

A mere expectancy, however strong, is not such an interest as is sufficient to entitle the plaintiff to maintain a bill, he must have a positive interest.[45] When the party seeking to perpetuate the testimony was the next of kin of a lunatic, the lunatic intestate and in the most helpless state, his recovery is a physical impossibility, even if he were *in articulo mortis*, and the bill was filed at that instant, the plaintiff, it has been said, would not have such an interest in the subject of the suit as would qualify him to maintain the bill.[46] But if the heir and next of kin had entered into any contract with respect to his expectancies and possibilities, incurred any obligations, he might, upon the strength of such contract and obligations, maintain a bill to perpetuate testimony;[47] for such a bill it is held, may be maintained where there is any vested interest, however slight or trifling in value; and whether it be absolute or contingent, whether it be present or remote and future in enjoyment, and dependent upon the most remote and improbable contingencies, is wholly immaterial, for it is a present estate, although with reference to chances it may be worth little or nothing.[48]

(*b.*) *Defendant's Interest.*—The bill must also show that the defendant has, or that he pretends to have, or that he claims to have an interest to contest the title of the plaintiff in the subject of the proposed testimony.[49] Unless the defendant has or claims some interest it is utterly futile and fruitless to perpetuate the testimony, since it can have no operation or effect upon those who are the real parties in interest.[50]

It has been held to be sufficient to bind all the parties in interest to bring before the court those who are judicially held to represent them all; as the first tenant in tail who represents all subsequent interests.[51]

(*c.*) *Ground of Necessity.*—Finally, the bill must show ground of necessity for perpetuating the evidence. Such, for instance, as that the facts to which the testimony of witnesses, whom it is proposed to examine, relates, cannot be immediately investigated in a court of law; or that the sole right of action belongs to the other party; or that he has interposed some impediment, such as an injunction, to an immediate trial of the suit of law.[52] The rule is not to sustain a bill if it is possible that the matter can, by the party filing it, be

[41] Suffolk v. Green, 1 Atk. 450; Thorpe v. Macauley, 5 Madd. 218; Shackell v. Macaulay, 2 Sim. & S. 79.

[42] North v. Gray, 1 Dick. 14; Angell v. Angell, 1 Sim. & S. 89.

[43] May v. Armstrong, 3 J. J. Marsh. (Ky.) 260; Mason v. Goodburne, Rep. *temp.* Finch, 391; Dursley v. Fitzhardinge, 6 Ves. 261, 262; Belfast v. Chichester, 2 Jac. & W. 449, 451.

[44] Dursley v. Fitzhardinge, 6 Ves. 261-263; Belfast v. Chickester 2 Jac. & W. 451, 452.

[45] Sackville v. Ayleworth, 1 Vern. 105, 106; s. c., 2 Eq. Abridg. 234.

[46] Dursley v. Fitzhardinge, 6 Ves. 260; Sackville v. Ayleworth, 1 Vern. 105; s. c., 1 Eq. Abridg. 234; Smith v. Attorney-General, cited in 6 Ves. 260; Allan v. Allan, 15 Ves. 135, 136.

[47] Dursley v. Fitzhardinge, 6 Ves. 260, 261; Cooper Eq. Pl. 53, 54.

[48] Allan v. Allan, 15 Ves. 135, 136; Belfast v. Chichester, 2 Jac. & W. 451; Dursley v. Fitzhardinge, 6 Ves. 251; Story Eq. Pl. (8th ed.) § 301.

[49] Dursley v. Fitzhardinge, 6 Ves. 251.

[50] Story Eq. Pl. (8th. ed.) § 302.

[51] Finch v. Finch, 1 Ves. Jr. 534; Lloyd v. Johnes, 9 Ves. 37, 52-59; Cockburne v. Thompson, 16 Ves. 326; Reynoldson v. Perkins, Ambl. 565; Gifford v. Hort, 1 Sch. & Lefr. 408, 409, 411; Story Eq. Pl. (8th ed.) §§ 144, 145, 302.

[52] See Booker v. Booker, 20 Ga. 777; Commonwealth v. Stone, Thach. C. C. (Mass.) 604; Smith v. Grosjean, 1 Patt. & H. (Va.) 109; North v. Gray, 1 Dick. 14; Cox v. Colley, 1 Dick. 55; Dorset v. Girdler, Prece. Ch. 530; Story Eq. Pl. (8th ed.) § 303; 1 Whart. Ev. § 182.

made the subject of immediate investigation; because under such circumstances there is no ground of necessity.[53]

Where the facts can be immediately investigated in a court of law, the bill must allege the specific facts on which the plaintiff puts his case.[54] Such as that he has no present right to maintain an action; or that he has a title in remainder or reversion only after the expiration of a present existing estate or life;[55] or that he is himself in actual possession of the property, or in the present possession of other rights which he seeks to perpetuate by proofs.[56]

8. *The Prayer.*—The prayer to the bills should ask leave to examine witnesses touching the matter set forth, to the end that the testimony may be preserved and perpetuated.[57] It should also ask for a subpœna,[58] but must not ask for relief, for this would turn the bill into a bill for relief; which is inconsistent with the nature of a bill to perpetuate testimony.[59] If the bill prays relief it will be demurrable, and may be dismissed for that reason.[60]

Where a bill asks to perpetuate testimony and also prays relief, the court may allow the plaintiff to amend by striking out the prayer for relief, even after the testimony has been taken under it, and thus give effect to such testimony.[61]

9. *Who May Maintain.*—Any one interested may maintain a bill *in perpetuam rei memoriam.*[62] The right of action may be either in the plaintiff or the defendant in equity,[63] and may be maintained by a plaintiff out of possession as well as one in possession, provided he has no present right of action.[64] But the bill will not lie at the suit of the defendant in a pending action.[65]

The bill *in perpetuam rei memoriam*, which is the bill to perpetuate testimony, strictly so called, formerly could be filed only by persons who were in possession under their title, and therefore could not sue at law; if the testimony were required by persons out of possession, it was obtainable only by bill to examine witnesses *de bene esse*, and the latter could be filed only when an action was actually pending.[66]

10. *Place and Manner of Taking Testimony.*—Examinations *in perpetuam* should be had in the county where the witness resides, but may be taken elsewhere if the witness chooses to submit thereto.[67] The witnesses are to be examined according to the rules and practice of courts of law in reference to witnesses going abroad.[68] The proceeding must, as far as practicable, be carried on in conformity with the ordinary laws of evidence.[69] The witness is obliged to give his evidence under a commission *in perpetuam* in the same cases and to the same extent as he would were he called as a witness in the trial of the cause.[70] Where it is desirable to perpetuate the testimony of the defendant in regard to a matter in which his interest is adverse to that of the plaintiffi, the proper mode of examination is the same as that of the examination of all other witnesses for the same purpose; and it is only by so examining him that his deposition can be made evidence at any future period, in another suit.[71]

[53] The New York & Baltimore Coffee Polishing Co. v. The New York Coffee Polishing Co., 20 Blatchf. C. C. 174, 176; s. c., 62 How. Pr. 485.

[54] Mason v. Goodburne, Rep. *temp.* Finch, 391; Story Eq. Pl. (8th ed.) § 303.

[55] Dursley v. Fitzhardinge, 6 Ves. 260, 261.

[56] See Angell v. Angell, 1 Sim. & S. 83; Dorset v. Girdler, Prece. Ch. 531; Dew v. Clarke, 1 Sim. & S. 114; Com. Dig. tit. "Chancery."

[57] Cooper Eq. Pl. 52.

[58] Story Eq. Pl. (8th ed.) § 306.

[59] Rose v. Gannel, 3 Atk. 439; Vaughan v. Fitzgerald, 1 Sch. & Lefr. 316; Cooper Eq. Pl. 51; Story Eq. Pl. (8th ed.) §§ 312, 314.

[60] Dalton v. Thomson, 1 Dick. 97; Rose v. Gannel, 3 Atk. 439; Vaughan v. Fitzgerald, 1 Sch. & Lefr. 316.

[61] Vaughan v. Fitzgerald, 1 Sch. & Lefr. 316.

[62] Angell v. Angell, 1 Sim. & S. 89. Under the English statute (5 & 6 Vict. ch. 69) any person who would, under the circumstances alleged to exist, become entitled upon the happening of any future event to any honor, title, dignity or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, shall be entitled to file a bill in chancery to perpetuate any testimony which may be material for establishing such claim or right. See Starkie Ev. (10th ed.) 428. Before this statute, upon petition, of right, a commission issued, and an inquiry was thereupon found and returned in chancery; and the depositions taken under such commission were admissible in evidence, the witness being out of the jurisdiction of the court, unable to attend the trial, or dead. Baron de Bode's Case, 8 Q. B. 208, s. c. 55 Eng. C. L. 208.

[63] Angell v. Angell, 1 Sim. & S. 89.

[64] Booker v. Booker, 20 Ga. 777, 781.

[65] Spencer v. Peek, L. R. 3 Eq. 415.

[66] See 1 Story Eq. Jur. (11th. Ed.) § 664; Starkie Ev. (10th. Ed.) 428.

[67] Jackson v. Leek, 12 Wend. 105.

[68] Tyler Ev. § 490.

[69] See Heffter Inst. 523; 1 Whart. Ev. § 181.

[70] *In re* Kip, 1 Paige Ch. 601.

[71] Ellice v. Roupell, 9 Jur. (N. S.) 530.

11. *Defenses.*—In bills *in perpetuam* the defendant may allege any facts going to show that there is no occasion to perpetuate the testimony; this may be done by way of plea, based either upon the ground that there exists no such dispute or controversy as is set forth in the bill, or that the plaintiff has no such interest in it as will justify his application to perpetuate testimony.[72] But it seems that if the defendant make answer to the bill as first presented, he cannot, after the same is amended and new points of inquiry presented, plead to the amended bill, that since the filing of the original bill the plaintiff has instituted another suit in equity, in which he had made the several matters raised by the amended bill the subject of judicial investigation; for although such a plea might be good to the original bill, the defendant having consented to answer cannot afterwards plead to the amended bill." However, if the amended bill changes the nature of the original from one to perpetuate testimony so as to combine it with a claim for discovery from the defendant, the defendant will not be bound to make further answer.[73]

12. *Hearing.*—A bill to perpetuate testimony is never brought to a hearing;[74] relief not being prayed by the bill[75] the suit is terminated by the examination of the witnesses;[76] or is at least suspended until the anticipated action is brought; and then, at the proper time, an order for the publication thereof may be obtained from the court upon a proper case made—as by showing the death or absence of the witnesses, or their inability, from sickness or other causes, to attend the trial.[77]

In the event that the case should be improperly brought to a hearing, it will be dismissed; but such dismissal will not affect the depositions, which may still be used as evidence on a proper occasion.[78]

[72] Ellice v. Roupell, 9 Jur. (N. S.) 530.

[73] Story Eq. Pl. (8th. Ed.) § 306 *a*.

[74] Vaughan v. Fitzgerald, 1 Sch. & Lefr. 316.

[75] Dalton v. Thomson, 1 Dick. 97.

[76] Morrison v. Arnold, 19 Ves. 670; Vaughan v. Fitzgerald, 1 Sch. & Lefr. 316; Anon., Ambl. 237; Anon., 2 Ves. Sr. 497; Hall v. Hoddesden, 2 P. Wms. 162; 3 Bl. Com. 450; Coopr. Eq. Pl. 52; 2 Story Eq. Jur. (11th. ed.) §§ 1502, 1512.

[77] Morrison v. Arnold, 19 Ves. 671; Teale v. Teale, 1 Sim. & S. 385; Abergavenny v. Powell, 1 Meriv. 433.

[78] Hall v. Hoddesden, 2 P. Wms. 162, 163; Anon, 2 Ves. Sr. 497; Anon. Ambl. 237; Acland v. Gaisford, 2 Madd. 37, note; Vaughan v. Fitzgeral, 1 Sch. & Lefr. 316; Rose v. Gannel, 3 Atk. 439.

13. *Statutory Requirements.*—Statutes authorizing the taking of depositions *in perpetuam rei memoriam* are in derogation of the common law,[79] are strictly construed[80] and their requirements must be minutely complied with;[81] and this fact must appear on the face of the deposition.[82]

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[79] Graham v. Whitley, 26 N. J. L. 254; Winooskie Turnpike Co. v. Ridley, 8 Vt. 404.

[80] Shutte v. Thompson, 15 Wall. 151; Bell v. Morrison, 1 Pet. 351; The Patapsco Ins. Co. v. Southgate, 5 Pet. 604; Carrington v. Stimson, 1 Curt. 437.

[81] Dunkle v. Worchester, 5 Biss. 102; Jones v. Neale, 1 Hughs. 268; Wilson Sewing Machine Co. v. Jackson, 1 Hughs. 195; Patterson v. Fagan, 38 Mo. 70; Tayon v. Hordman, 23 Mo. 539; Wallace v. Mease, 4 Yeates (Pa.), 520; Bascom v. Bascom, Wright (Ohio), 632; Bradstreet v. Baldwin, 11 Mass. 229, 233; Danes v. Allen, 14 Pick. 313; Welles v. Fish, 3 Pick. 74; Fabyan v. Adams, 15 N. H. 371; Brighton v. Walker, 35 Me. 132; Parsons v. Huff, 38 Me. 137; Winooskie Turnpike Co. v. Ridley, 8 Vt. 404.

[82] Dye v. Bailey, 2 Cal. 383; Williams v. Chadbourne, 6 Cal. 559. Where a party at whose request a deposition *in perpetuam* was taken, omitted, in his application for the commission, to state that he was desirous of perpetuating the testimony of witnesses, as prescribed by the Massachusetts, R. S. ch. 94 § 34, but no objection was made, for that reason, at the time of taking the deposition, and the notice of the magistrate to the defendant and the certificate showed that the deposition was taken *in perpetuam*, it was held that the deposition was not, because of such omission in the application, inadmissible in evidence. Commonwealth v. Stone, Thach. C. C. (Mass.) 604.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—FIRM AND INDIVIDUAL ASSETS.

CROOK V. RINDSKOPF.

New York Court of Appeals, April 26, 1887.

1. A firm, in making an assignment of its effects and the effects of each individual to a trustee for the benefit of their creditors, may stipulate in the deed of assignment that whatever remains after the firm creditors are paid shall be applied to the payment of their individual debts by the assignee.

2. And such assignment will not be set aside as fraudulent, even though it stipulates that, "with the remainder and residue of said net proceeds and avails, if any there be, the assignee shall pay and discharge all the individual debts of the assignors or either of them, providing such remainder shall be sufficient for that purpose, and if insufficient, then the same shall be applied *pro rata*, share and share alike, to the payment of said debts, and according to their respective amounts."

3. The fact that the individual assets of the members of the firm were of a different value will not be sufficient to show a fraudulent intent.

4. Such an instrument is the joint act of the firm, so far as their joint property was concerned, and it was the individual contract of the respective members, so far as it dealt with individual property.

5. In the interpretation of such contracts the same rules are to be used as in the interpretation of other contracts.

RUGER, C. J., delivered the opinion of the court:

On the twenty-third of October, 1882, Leopold Rindskopf and Meyer Rosenthal, composing the firm of Rindskopf & Rosenthal, executed an assignment of all their property, both real and personal, in trust to Abraham Rosenthal to convert the same into money, and after paying the lawful expenses of the trust, to pay their partnership debts in the order specified in the instrument. It then provided "that with the remainder and residue of said net proceeds and avails, if any there shall be, the party of the second part shall pay and discharge all the individual and private debts of the parties of the first part, or either of them, whether due or to become due, providing such remainder shall be sufficient for that purpose; and, if insufficient, then the same shall be applied *pro rata*, share and share alike, to the payment of said debts, and according to their respective amounts." It was further provided that, if there was any surplus then remaining, it should be repaid to the said assignors, or to their executors, administrators, or assigns. The proof established the facts that the assigned estate amounted in value to the sum of $9,360.87, and the firm indebtedness to $14,667.87, and that the individual assets of the members of the firm amounted to $40, of which Rindskopf owned $10 and Rosenthal $30. Rindskopf's absolute individual liabilities amounted to $300, and his contingent liabilities to $4,300, and Rosenthal's absolute individual liabilities to $2,850. The plaintiff, being a judgment creditor of the firm, brought this action to set aside the assignment upon the ground that it was made with intent to hinder, delay and defraud the creditors of said assignors, and to have the assets of the assigned estate applied to the payment of his debt. Both the assignors and assignee, respectively, appeared and answered in the action, and the assignee denied all the allegations contained in the complaint imputing fraud to the assignors, which put the plaintiff to the proof of his case. No attempt was made on the trial to show any fraud in the assignment, except such as was sought to be inferred from the provision relating to the payment of individual debts, considered in connection with evidence tending to show that the individual members of the firm owned individual assets of unequal amounts in value, and were liable in unequal sums upon their respective partnership accounts, also for individual debts. The trial court found that there was no fraud in fact in the making of the assignment, and as a conclusion of law that the instrument constituted a valid transfer of the property of the assignors to their assignee, and ordered judgment dismissing the complaint. Upon appeal, the general term reversed the judgment and ordered a new trial. As that court did not assume to reverse the judgment upon the facts, its order can now be sustained only upon the theory that the undisputed evidence furnished conclusive proof of fraudulent intent on the part of the assignors in making their assignment. The conclusion of that court was based wholly upon the ground that the clause of the assignment providing for the payment of the individual creditors of the respective assignors, considered in connection with the facts of inequality in the amount of individual indebtedness, of value of individual assets, and of the amount of the respective accounts with the partnership firm, operated as a fraud in law upon the individual creditors of the partner having the largest individual estate, and afforded conclusive evidence of a fraudulent intent on the part of the assignors rendering the assignment wholly void.

Passing over the questions as to whether an intended fraud by one member of a firm in transferring his individual assets avoids an assignment of the firm assets made by the firm, and whether such a fraud, affecting a distinct portion of the assets devoted to a special class, is inseparable, and must, as matter of law, be held to vitiate the entire trust, we will first consider the case upon the theory discussed by the court below. The burden was upon the plaintiff to show by affirmative evidence that the enforcement of the provisions of the assignment must necessarily work a fraud upon the creditors of the assignors, or one of them, and that it could not legally be carried out without producing such a result. It has, in some cases, been held that assignors for the benefit of creditors, who contemplate and provide in their assignment for an illegal disposition in any respect of their property, are not at liberty, in an action to set it aside, to show, as proof of innocence of fraudulent intent, that the assigned fund was insufficient to satisfy the prior valid provisions of the assignment, and could not, therefore, be affected by the alleged illegal provision, and are estopped from controverting the existence of the conditions which they had provided for. Collomb v. Caldwell, 16 N. Y. 485, and cases there cited. It has, however, been frequently held that it may be shown, in rebuttal of an inference of fraudulent intent arising from provisions for the payment of individual debts, they were, in fact, no such debts or individual assets to be affected by such provision (Turner v. Jaycox, 40 N. Y. 470; Bogert v. Haight, 9 Paige, 297), or that the property formerly belonging to the firm had become the property of purchaser making the assignment (Dimon v. Hazard, 32 N. Y. 68), and other circumstances showing that no fraud in fact was intended. Dimon v. Hazard, *supra;* Hurlbert v. Dean, 41* N. Y. 97. The principle that a party may be inquired of as to his intent in doing an act, where such intent is material, tends strongly to confirm

the proposition that the presumption of fraud arising from the provisions of an assignment may be repelled by parol evidence. Seymour v. Wilson, 14 N. Y. 567; Hunt v. Johnson, 44 N. Y. 27.

The plaintiff in this case, anticipating the probable defense, did not rely upon the presumptions of fraud arising from the assignment alone, but undertook to establish the fact affirmatively that, in the actual circumstances of this case, the execution of the provision in question would necessarily operate as a fraud upon creditors. It is unnecessary, therefore, to assail the doctrines enunciated in Collomb v. Caldwell, 16 N. Y. 485; Barney v. Griffin, 2 N. Y. 365; Goodrich v. Downs, 6 Hill, 438, and similar cases; for, conceding them to the fullest extent claimed, the facts of this case do not bring it within their operation.

It is lawful for an insolvent member of a firm to devote his individual property to the payment of firm debts, to the exclusion of his individual creditors. Dimon v. Hazard, 32 N. Y. 65; Saunders v. Reilly, 104 N. Y. ——, *ante*, 170; Royer Wheel Co. v. Fielding, 101 N. Y. 504, 5 N. E. Rep. 431; Kirby v. Schoonmaker, 3 Barb. Ch. 46, and it follows from the same principle that he may also apply it to the payment of any debt owing by him to his partners in the firm, and no inference of fraud can legally be derived from such dispositions of his individual property. This case was decided by the general term, as appears from their opinion, solely upon the ground of a fraud alleged to have been intended by Rosenthal upon his individual creditors. The argument of the respondent is, in brief, that Rosenthal having $20 more individual property than Rindskopf, the law will assume that he, by placing that sum in a common fund with other individual assets, and directing the payment of their aggregate individual indebtedness therefrom, intended to commit a fraud upon his individual creditors, because, it is said, if the excess of Rosenthal's individual assets is distributed *pro rata* among each and all of the individual creditors of both parties according to the amount of their respective claims, that Rindskopf's creditors will necessarily receive something to which Rosenthal's creditors were equitably entitled.

We think this argument, upon the facts of the case, is defective in several particulars. It is not at all certain that such a result would follow in this case; for, if Rindskopf's contingent liabilities never became fixed, there would be only $300 of his individual debts to be paid as against $2,850 of Rosenthal's, and in that event private property of Rindskopf's would be taken to pay Rosenthal's individual debts. We also think the result claimed does not follow from the premises assumed by the court below, but that it would necessarily be produced only by the existence of exact equality of interest in the firm assets by both members, of a greater interest in Rosenthal combined with equality in individual indebtedness, and inequality in the individual property. If there is simply inequality of interest in the firm assets, and inequality in individual assets, one inequality could be easily compensated by a corresponding inequality in the other, and the evidence does not show but that this State of things in fact existed. It does appear that the assignors were equal partners in their firm business, but there is no evidence as to the amount they each originally contributed to the capital of the firm, except that the amounts were about equal. Neither does it appear how much they had respectively drawn from the firm, except that the amounts were nearly equal. As the witness says, one might have contributed "a little more or a little less than the other." No statement of accounts between the respective parners has been given showing their liabilities to the firm, or the amount of their respective interests in its assets, and, for aught that appears in the case, Rosenthal might, on a settlement of the partnership accounts, have owed Rindskopf the exact sum which it is claimed he diverted from his individual assets to the payment of Rindskopf's creditors. This, in the absence of a fraudulent intent, he had a perfect right to do, as he could lawfully pay his debt to his partner in preference to that of any other creditor, if done in good faith, and, if he did so in fact, it would relieve the clause in question from any criticism or objection. Royer Wheel Co. v. Fielding, 101 N. Y. 504, 5 N. E. Rep. 431; Dimon v. Hazard, 32 N. Y. 65.

Assuming that there was a surplus remaining after the payment of firm debts, and the assignment required this residue of $40 to be put into a common fund for the payment of the individual debts of both assignors, and that Rindskopf's contingent liability became fixed, it is evident that about $15 of his assets would be paid to Rosenthal's individual creditors, leaving $15 only subject to be diverted from them to the payment of Rindkopf's creditors. The insignificance of this sum, as compared with the amount of individual debts to be paid, and the almost infinitesimal amount of the dividend to individual creditors to be derived therefrom, would seem to furnish a conclusive answer to the presumption of fraud sought to be drawn from the obviously tentative provision in question. It would also seem, in view of the large amout of property transferred, and the trivial value of that which might be improperly paid out, that the maxim, *de minimis non curat lex*, might well have been applied and held to control the determination of the case. U. S. Trust Co. v. U. S. Fire Ins. Co., 18 N. Y. 200; Colman v. Shattuck, 62 N. Y. 363; Ross v. Hardin, 79 N. Y. 84-93. We conclude, therefore, upon this branch of the case, upon a consideration of the whole evidence, that, within the authorities cited below, every inference of fraud derivable from the provisions referred to was effectively answered. Bogert v. Haight, *supra;* Turner v. Jaycox, *supra;* Dimon v. Hazard, *supra;* Hurlbert v. Dean, *supra*.

We are also of the opinion that the provisions of this assignment, if fairly construed and en-

forced according to their natural meaning and import, would not occasion an illegal disposition of the individual property of either assignor. While heretofore there has been some diversity of opinion in the courts in respect to the proper rule to be applied in the construction of such instruments, we think the tendency of modern decisions, especially those of most approved authority, has been to adopt the same rules which obtain in the interpretation of other contracts. Knapp v. McGowan, 96 N. Y. 87; Rapalee v. Stewart, 27 N. Y. 315; Benedict v. Huntington, 32 N. Y. 219; Townsend v. Stearns, *Id.* 209. Among those rules is that requiring such an interpretation as will render the instrument consistent with innocence and the general rules of law, in preference to such as would impute a fraudulent intent to the assignor, or defeat the general purpose and intent of the conveyance. Ginther v. Richmond, 18 Hun, 234; Rapalee v. Stewart, 27 N. Y. 315; Benedict v. Huntington, 32 N. Y. 219; Townsend v. Stearns, *Id.* 209. Such transfers are sanctioned by law, and are, when made, like other contracts, to be fairly and reasonably construed, with a view of carrying out the intentions of the parties making them. When authority to do an act is conferred in general terms, it will be deemed to be, and to have been intended to be, within the limits prescribed by law. Kellogg v. Slauson, 11 N. Y. 302. In such cases as in others, doubtful and ambiguous phrases admitting of different meanings are, in accordance with the maxim *ut res magis valeat quam pereat*, to be so construed as to authorize a lawful disposition of the property only, although there may be general language in the instrument susceptible of a different construction. Townsend v. Stearns, *supra*.

If the instrument in question be considered in the light of these rules, we think it is not fairly subject to the criticism which has been made upon it. The insolvency of the firm of Rindskopf & Rosenthal necessarily worked its dissolution and a division of the interests of its respective members, except so far as their property was already legally disposed of by the assignment. After satisfaction of the firm debts by the assignee, the law would restore each member of the firm to his legal rights in the residue of the property, subject only to the execution of the power conferred upon the assignee to dispose of the same. It is essential to the argument of the respondents to establish that the language of this assignment contains authority to the assignee from each member of the firm to satisfy the individual debts of the other from the combined individual property. We do not think a proper construction of the instrument justifies the inference of such an authority. Certainly no such power is expressly given, and it would be contrary to settled rules to impute such an intention to its respective authors, unless the language of the instrument expressly requires it. The law would require, in the event of an assignment by a firm of two persons, that, after the payment of firm debts, the residue should be divided into two funds for the payment of individual creditors, and the only defect, if any, in this assignment, is that it did not expressly recognize the possible existence of the two funds. We think the law will supply this omission, and order a distribution of the fund according to the legal rights of the claimants upon it. It was plainly contemplated in the assignment itself that this division should be made in the eventful surplus, for that is directed to be paid to the parties of the first part, their executors, administrators, and assigns. This provision could be carried out only upon the assumption that a division of the residue had been made between the two assignors, and thus reflects strongly upon the intention of the conveyance in the use of the language criticised. A reasonable construction of this provision would seem to require that the language should be distributively applied, and held to mean that each member of the firm transferred such part of the property as he had a lawful right to convey, and subjected the residue of such part to the payment of such debts as he was individually liable for. The assignment purported to deal with all of the property, and its fair import was to distribute it to those who were legally entitled to it, paying the firm creditors first, and then, in case there were assets applicable to that purpose, providing for the respective individual creditors of the members of the firm. There is no language in the clause in question which expressly forbids such a construction, or requires that the property of one should be applied to the payment of the debts of the other, and its whole language would be satisfied by the distribution of the share of each in payment of his individual debts. Upon the satisfaction of the debts of the firm, it would be the legal duty of the assignee, even in the absence of any express provision requiring it, to determine the interest of the individual partners in the surplus, and devote each share to the interest of its respective owner, in accordance with his legal rights. Eyre v. Beebe, 28 How. Pr. 333; Friend v. Michaelis, 15 Abb. N. C. 354.

While the instrument was necessarily the joint act of the firm, so far as their joint property was concerned, it was the individual contract of the respective members, so far as they dealt with individual property. When providing for their joint interests and property, which constituted the main object of the assignment, they spoke their joint interest and purpose; but when dealing with their individual interests, although inaptly continuing the use of the phraseology applicable to its earlier provisions, their language must be construed as referring to and expressing only their individual wishes with reference to their individual property and liabilities. In case a surplus arose in the administration of this estate, and it became the subject of judicial controversy among the individual creditors of the members of the firm, it could not reasonably be said that there is anything in the language of the assignment

which precluded Rosenthal or his creditors from demanding that his individual property should be applied to the payment of his individual debts.

It may be finally said that the effect of the provision complained of could not in any event have been intended to defraud the creditors of the firm, and until they are aggrieved they have no cause of action. Royer Wheel Co. v. Fielding, 101 N. Y. 510, 5 N. E. Rep. 431; Dimon v. Hazard, *supra*.

The order of the general term should be reversed, and that of the special term affirmed.

NOTE.—While the decision in the principal case is novel, it is certainly a just application of the principles of the law upon the subject adjudicated. From this decision we are to learn that it is not illegal for a partnership to make an assignment and stipulate therein that, after the partnership debts are paid, that moneys remaining in the hands of the assignee be applied on the individual debts of each individual.

The assignment in the principal case was sought to be set aside on the ground that, because it had such a stipulation, and from the fact that the individual assets of the partners were not quite equal, and that, therefore, it was made with the intent to defraud, delay and hinder the individual creditors in the collection of their debts. The answer of the court upon this question seems to be so complete that any comments thereon would appear unnecessary.

In the case of Vernon v. Upson[1] it was held that a voluntary assignment by an insolvent firm for the benefit of its creditors, which assignment contains preferences in favor of creditors of the individual partners, is void as against the unpreferred creditors of the firm, who repudiate the assignment.

Where a partnership makes an assignment for the benefit of creditors, in which it prefers as a creditor a bank which holds the note of one of the partners, indorsed by a third person, the assignment is *prima facie* fraudulent.[2] And even where, as in this case, it was shown that the note was signed by the one member of the firm for the benefit of the firm and that it was a debt which the firm ought to pay.

In Mann's Estate[3] it was held that an assignment, made under the insolvent laws of that State, is not invalidated by a stipulation therein that any surplus which remains in the hands of the assignee after the payment of the releasing creditors shall be returned to the assignor, no matter what may be the intent of the assignor.

Intent.—A deed of assignment does not show palpable fraud in that the person made the assignee is the legal adviser of the assignor, and that the payment of the fees and expenses of such legal adviser in conducting the necessary legal business, in connection with the collection and payments intrusted to him, is stated therein as the first object of the trust.[4]

To make the transfer fraudulent there must be an intent to defraud, and an act which will actually defraud creditors by hindering, delaying or preventing the collection of their claims.[5] The fraudulent intent must be alleged in the petition and proven on the trial.[6] The intent must be to defraud, hinder or delay creditors, or it does not fall within the statute of 13 Eliz., ch. 5. An intent to deceive or defraud, or hinder or delay the public has been held not to be within the statute.[7] The term hinder and delay relates, not only to time, but has reference also to the interposition of obstacles with the fraudulent intent to hinder and delay.[8]

The statute implies two acts: 1st. To hinder and delay. 2d. To defraud creditors. The mere intent to defraud is said to vitiate a transfer.[9] There is something of a more vicious nature implied by the word "fraud" than by the term "hinder and delay." Hinder and delay are synonymous, mere pleonasms introduced out of the abundance of precautions.[10] The duration of the hinderance or delay has nothing to do with the matter.[11] It has been held that creditors have as much right to receive their bills when due as they have to receive them at all.[12] Only such hinderances and delays as operate as a fraud come within the statute.[13]

Yet, in Wolsheimer v. Revinus[14] it was held that the reservation of a reasonable fee for the draughtsman of the deed for its preparation is such a preference in a deed of assighment for the benefit of creditors as is forbidden by the insolvent act of that State.

But assignments for the benefit of creditors not within the statute.[15] In Mitchel v. Stiles[16] it was said by the judge in rendering the opinion of the court: "I don't perceive any force in the argument that all assignments for the benefit of creditors produce delay and hinderance. And so perhaps they do; but it is delay unavoidably incidental and resulting from the execution and performance of such assignment. Delay is incident to all human affairs. We cannot annihilate space and time. But in this and all its kindred cases the delay is by the will of the grantor, and the hinderance and obstruction to the creditors are stipulated for in the deed. A very different affair indeed. And it is from this circumstance the law infers the intent."

Kinds of Fraud.—There are two kinds of fraud: First, where the instrument itself makes the transaction fraudulent. This is called fraud in law, or constructive fraud.[17] "Fraud," as was said in Estwick v. Caillaud, by Justice Buller, "is sometimes a question of law, sometimes a question of fact, and sometimes a mixed question of law and fact. If we were to decide on the face of the deed itself, that is a question of fraud in point of law."[18] "Perhaps," says a well-known text-writer, "it would be more accurate to say that fraud is never purely a question of law, nor exclusively a question of fact, though it may frequently partake more largely of the one quality than of the other."[19]

Second, where there is an act that hinders, delays or

1 60 Wis. 418; Powers v. Hamilton, 18 N. W. Rep. 20.
2 Willis v. Bremner, 60 Wis. 622.
3 32 Minn. 60.
4 Burr v. Clement, 9 Pac. Rep. 633.
5 Baldwin v. McLaughlin, 11 N. W. Rep. 77.
6 Thompson v. Jackson, 3 Rand. 504.
7 Griffin v. Stoddard, 12 Ala. 783.
8 Linn v. Wright, 18 Tex. 317; Hefner v. Metcalf, 1 Head, 577.
9 Sutton v. Hanford, 11 Mich. 513; Devanport v. Cummings, 15 Iowa, 219; Pilling v. Otis, 13 Wis. 495.
10 Read v. Worthington, 9 Bosw. 617; Burdick v. Post, 12 Barb. 168.
11 Quarles v. Kerr, 14 Gratt. 48.
12 Nickelson v. Leavitt, 4 Sandf. 253.
13 Hoffman v. Mackall, 5 Ohio St. 124.
14 21 Cent. L. J. 398.
15 Wilder v. Winne, 6 Cow. 284.
16 13 Penn. 309.
17 Lukins v. Bird, 6 Wall. 78.
18 5 Term Reporter, 420.
19 Burrill on Assignments; Foster v. Woodfin, 11 Ired. L. 339.

defrauds creditors, and which is conceived in, "devised and contrived of malice, covin, collusion or guile," and where the intent is marked by these characters, or any of them, it is a fraud in fact.[20]

The presence of the intent is a very necessary element.[21] A legal and not a moral intent is referred to. Parties may do what they consider perfectly fair to prevent a sacrifice, with the intention of paying all their debts ultimately, or may be actuated purely by motives of compassion or affection, and yet be guilty of gross fraud upon creditors,[22] if the tendency of such acts and its legitimate effect are to defeat or delay creditors.[23]

Constructive fraud is a question of law; fraud in fact is a question of evidence.[25] And when the intent is material the party may testify as to what his intent was,[26] but where there is no dispute as to the facts it is purely a question of law.[27]

The fraudulent act must be clearly made out; it will not, as a rule, be presumed[28] or inferred from slight evidence, but it is a conclusion drawn from all the circumstances surrounding the case and the parties.[29]

A party is conclusively presumed to have intended fraud if fraud logically follows from his conduct,[30] for every man is presumed in the legal, as well as in the moral world, to intend the natural consequences of his acts.[31] When the intent with which the act was done is the gist of the action, the presumption is that every sane man contemplates and intends the necessary, natural and probable consequences of his acts.[32] If one intends to do that which he is conscious the law forbids, no other evil intent need be shown.[33]

When the proof shows that an unlawful act was done, the law presumes the intent, and a proof of the act being a violation of law, is a proof of intent.[34] And where the conduct of a debtor necessarily results in defrauding his creditors, he is presumed to have foreseen to have intended such results.[35]

In New York, it was held by the chancellor, in Wakeman v. Grover,[36] that an assignment which is void in part, on the ground of being against the provisions of a statute, is void *in toto*, and no interest passes thereby to the assignee as against the creditors who did not assent to it. In commenting on this subject, in Howell v. Edgar,[37] Justice Scates says: "'The statute,' observes Lord Hobert, 'is like a tyrant; when he comes he makes all void; but the common law is like a nursing father, and makes void only that part where the fault is and preserves the rest.'[38] But the common law doth divide according to reason, and having made that void which is against law lets the rest stand as it is."[39]

The construction placed by the court upon the deed of assignment in the principal case is such as will commend itself as just and right. It would be very difficult indeed for me to see any fraudulent intent from any of the acts of the parties in the principal case. * * *

[20] Ewing v. Runkle, 20 Ill. 448; Meux v. Howell, 4 East, 1.
[21] Sibley v. Hood, 3 Mo. 29.
[22] Flood v. Prettyman, 24 Ill. 597; Briggs v. Mitchell, 60 Barb. 288; Gardner Bank v. Wheaton, 8 Me. 373.
[23] Enders v. Swayne, 8 Dana, 103.
[25] Evan v. Rugee, 23 N. W. Rep. 24; Sweet v. Wright, 17 N. W. Rep. 468.
[26] Frost v. Rosecrans, 23 N. W. Rep. 875.
[27] Sturtevant v. Ballard, 9 Johns. 342; Burrill on Assignments, 470.
[28] Grover v. Grover, 3 Md. Ch. 29; Wersiger v. Chisholm, 28 Tex. 780; Lyman v. Cersford, 15 Iowa, 229.
[29] Jones v. Emery, 40 N. H. 348; Forsyth v. Matthews, 14 Pa. St. 100; Baldwin v. Buckland, 11 Mich. 389.
[30] Hilliard v. Cayle, 46 Miss. 309.
[31] Gillett v. Phelps, 12 Wis. 392.
[32] People v. Sweeny, 22 N. W. Rep. 50.
[33] U. S. v. Houghton, 14 Fed. Rep. 544.
[34] U. S. v. Baldridge, 11 Fed. Rep. 552.
[35] Gollober v. Martin, 6 Pac. Rep. 267.
[36] 4 Paige, 23-37; Mussey v. Noyes, 26 Vt. 472.
[37] 4 Ill. 417.
[38] 1 Mod. 35.
[39] 9 Pet. 679.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. ADMIRALTY—Seamen's Wages—Evidence.——Evidence will not be admitted to carry a demand for seamen's wages earlier than the date named in the libel. In such case the libel must be amended to fit the evidence.—*Pinkham v. Rutan*, U. S. D. C. (Penn.), June 30, 1887; 31 Fed. Rep. 496.

2. ALASKA — Slavery — Citizenship — Liquor Traffic — Indian Country.——The act of congress extending two sections of the Indian intercourse laws to Alaska makes that land Indian country only to that extent. The Indians are dependent subjects, and involuntary slavery among them is contrary to law.—*In re Sah Quah*, U. S. D. C. (Alaska), May 8, 1887; 31 Fed. Rep. 327.

3. APPEAL—Bond—Agent.—— An appeal bond purporting to be the bond of A, by his agent B, signed B, agent of A, is B's bond.—*Savannah, etc. R. Co. v. Clark*, S. C. Fla., June 21, 1887; 2 South. Rep. 667.

4. APPEAL—Exceptions—Injury.—— Unless the appellant shows affirmatively that he has been aggrieved his exceptions will not be entertained.—*Spinney v. Bowman*, S. J. C. Me., June 6, 1887; 10 Atl. Rep. 252.

5. APPEAL—Failure to Prosecute.——Upon failure to prosecute the appeal the appellee may have the judgment affirmed against the appellant and his sureties, upon production of the appeal bond, a transcript of the judgment and of the journal entry of the notice of appeal, duly authenticated.—*O'Hare v. Wilson*, S. C. Wash. Ter., Jan. 17, 1887; 14 Pac. Rep. 395.

6. APPEAL—Final Judgment.——When a demurrer to the complaint has been sustained, but no final judgment rendered, an appeal cannot be taken.—*State v. Falconer*, S. C. Ark., July 9, 1887; 5 S. W. Rep. 193.

7. APPEAL—Judgment—Recital of Facts—Review.—— A recital in the judgment of the appellate court that the facts are the same as they were in the former appeal, sufficiently complies with the law about reciting the facts in their judgment. The judgment of the appellate court on the facts will not be reviewed by the supreme court.—*People v. Soncy*, S. C. Ill., June 20, 1887; 12 N. E. Rep. 746.

8. APPEAL—Motion for Reargument—Statement.—— Where a case is reversed, sustaining the dissenting opinion of a judge at the general term, a motion for a reargument, because that opinion contains some expressions to embarrass a new trial, should contain all the necessary information for the appellate court.—*Anderson v. Continental, etc. Co.*, N. Y. Ct. App., June 28, 1887; 12 N. E. Rep. 793.

9. APPEAL—Motion to Set Aside—Verdict—Necessity of. ——Where exceptions are taken at the trial to the rulings of the court on instructions to the jury or in regard to the admissibility of evidence, unless a motion to set aside the verdict is made in the trial court, the appellate court will regard such exceptions as waived, and will not review such ruling.—*Brown v. Brown*, S. C. App. W. Va., June 25, 1887; 2 S. E. Rep. 808.

10. APPEAL—New Trial—Judge's Verification — Ejectment—Res Adjudicata.——The grounds of a new trial, which was refused, will not be considered, unless verified by the trial judge. In ejectment deeds cannot be introduced which would establish a title independent of one established in a prior suit of ejectment between privies of the present parties.—*McDowell v. Sutlive*, S. C. Ga., Feb. 8, 1887; 2 S. E. Rep. 937.

11. APPEAL—New Trial—Jurisdiction—Justice.——An inferior court may grant a new trial, though the verdict is in excess of its jurisdiction. Such orders cannot be appealed from. A person may waive interest in an open account to bring it within the jurisdiction of a justice.—*Kirk v. Grant*, Md. Ct. App., June 22, 1887; 10 Atl. Rep. 230.

12. APPEAL—Statement of Facts—Certificate. —— A statement of the facts on appeal, not certified as required by law, will be stricken from the record on motion.—*Zenkner v. North. Pac. R. Co.*, S. C. Wash. Ter., Jan. 21, 1887; 14 Pac. Rep. 596.

13. APPEAL— Transcript—Filing— Mandamus. —— A motion to affirm for not filing a transcript will be held up, pending a *mandamus* proceeding, to the trial judge, when it appears by such proceeding that the failure to file the transcript was caused by the neglect of the judge in settling the facts of the case.—*Norager v. Norvald*, S. C. Wash. Ter., Jan. 10, 1887; 14 Pac. Rep. 593.

14. APPEAL—Trial De Novo.——If an issue is decided by a jury in a justice's court, it cannot, upon appeal, be tried in the circuit court otherwise than according to the rules of common law. And the appellate court will reverse on this ground, although no objection had been made in the circuit court.—*Hall v. Wadsworth*, S. C. App., W. Va., June 28, 1887; 3 S. E. Rep. 29.

15. ASSIGNMENT—For Creditors—Exemption—Statutes. ——An assignment for benefit of creditors is not void because the assignor reserves in the instrument property which, by law, is exempt from execution. Construction of Maryland law of 1861, ch. 7, which exempts property from execution.—*Muhr v. Muhr*, Md. Ct. App., June 23, 1887; 10 Atl. Rep. 289.

16. ASSIGNMENT—For Benefit of Creditors—Validity.— Under Texas act, March 24, 1879, an assignment is not invalid because it fails to state specifically that all the creditor's property is thereby conveyed.—*McCart v. Maddox*, S. C. Tex., June 10, 1887; 5 S. W. Rep. 150.

17. ASSUMPSIT—Damages—Evidence — Competency.— In *assumpsit* for goods sold, which the defendant claims were of poor quality, the plaintiff cannot prove the good quality of goods of the same grade sold at the same time to other parties.—*Henkel v. Burke*, S. J. C. Me., June 6, 1887; 10 Atl. Rep. 249.

18. ATTACHMENT— Levy — Possession — Return. —— Where personal property is attached the officer must take it into his possession, when he may give it to a keeper, or to the defendant by his giving a forthcoming bond. When the return states that it was attached subject to a prior attachment, the execution creditor may show that the prior attachment was not legally made.—*Root v. Columbus R. Co.*, S. C. Ohio, June 7, 1887; 12 N. E. Rep. 812.

19. ATTACHMENT — Levy — Taking Possession. —— Under the attachment law, property of a non-resident with no one in charge thereof may be levied on as in other cases of levy.—*Dorrier v. Masters*, S. C. App. Va., June 16, 1887; 2 S. E. Rep. 927.

20. BASTARDY—Constitution—Fourteenth Amendment. ——The Maryland bastardy law in the code of 1860, is invalid and not in conflict with the fourteenth amendment to the United States constitution.—*Plunkark v. State*, Md. Ct. App., June 22, 1887; 10 Atl. Rep. 225.

21. BILLS AND NOTES—Protest—Notice—Certificate.— A negotiable note payable at a certain bank, it must be presented there for payment to bind an indorser. Notice of protest to an indorser residing in the town must be personal; if he resides elsewhere the notice to him must be mailed on the next day after protest. The certificate should state that the notices were mailed to certain places and that they were the residences of the parties, in the absence of other proof.—*Peabody Ins. Co. v. Wilson*, S. C. App. W. Va., April 9, 1887; 2 S. E. Rep. 888.

22. BOND — Forthcoming Bond — Mistake. ——It is error to quash a forthcoming bond because the name of the obligee is misspelled or illegible. Courts can admit parol evidence to explain and correct a clerical error of this description.—*Ambach v. Armstrong*, S. C. App. W. Va., June 25, 1887; 3 S. E. Rep. 44.

23. CARRIERS—Interstate Commerce Act — Long and Short Haul — Passes. —— The fact that competition exists in such carriage, justifies a common carrier, in charging less for such carriage than for a shorter haul included therein, under the interstate commerce act. Carriers cannot, under that act, give passes to the families of its officers and employees.—*Ex parte Koehler*, U. S. C. C. (Oreg.), July 4, 1887; 31 Fed. Rep. 315.

24. CARRIERS — Tickets — Signature — Waiver. ——A party bought a 1,000 mile ticket, which, unknown to him, required his signature, and on which he had ridden several times: *Held*, that the conductor was not justified in putting him off for refusing to sign it.—*Kent v. Baltimore, etc. R. Co.*, S. C. Ohio, June 28, 1887; 12 N. E. Rep. 798.

25. CERTIFICATE OF DEPOSIT — Demand — Statute of Limitations.——A certificate of deposit by a bank is a promissory note due immediately. No demand is necessary. The statute of limitations begins to run as soon as the certificate is issued.—*Mitchell v. Wilkins*, S. C. Minn., July 29, 1887; 33 N. W. Rep. 910.

26. CHARTER-PARTY—Agent—Damages.——The broker of a ship-owner agreed without authority from his principal to fit up oil-tanks in a ship chartered. The charterer's broker knew that he had no authority to make this agreement; after one voyage had been made the owner did fit up oil-tanks, and afterwards sued the charterer for the expense of so doing. The charterer filed a cross-bill for damages for the delay: *Held*, that neither party had any cause of action.—*LaCompani etc. v. Spanish, etc. Co.*, U. S. D. C. (N. Y.), June 14, 18[illegible] 31 Fed. Rep. 492.

27. COLLISION—Slips—Custom.——Tugs accustomed to do business in slips are chargeable with notice of the custom of the occupants regarding breasting off and the use of warps across the slip.—*The Fulda*, U. S. D. C. (N. Y.), May 23, 1887; 31 Fed. Rep. 351.

28. CONSTITUTIONAL LAW—Cities—Taxation—Statutes.——For the purposes of legislation cities constitute a class, and laws applicable to cities only are not unconstitutional. Construction of the statute law of New Jersey relative to taxation, municipal corporations, powers of commissioners, due process of law, etc.—*In re City of Elizabeth*, S. C. N. J., Aug. 4, 1887; 10 Atl. Rep. 363.

29. CONSTITUTIONAL LAW—Due Process of Law—Highways—Taxes.——The act authorizing the settlement by arbitration of any tax paid by a road-board is constitutional. Either the owner of the land or the mortgagee may apply under the act.—*State v. Skenkle*, N. J. Ct. Err. & App., June Term, 1887; 10 Atl. Rep. 379.

30. CONTRACT—Act of God.——A railroad company which contracts to pay one-third of the expense incurred in keeping in repair a certain bridge, is bound to pay one-third of the expense in replacing it if it is partly blown down by a cyclone.—*Central, etc. R. Co. v. Wabash, etc. R. Co.*, U. S. C. C. (Mo.), June 8, 1887; 31 Fed. Rep. 440.

31. CONTRACT—For Board—Absence.——Where a person contracted with a landlord for board for himself and wife at $12.00 per week, no time for the continuance of the contract being specified, and the wife was absent forty-three weeks: *Held*, that the boarder was entitled to a reasonable deduction therefor.—*Green v. Lavender*, S. C. Vt., Aug. 1, 1887; 10 Atl. Rep. 311.

32. CONTRACT—County—Bridge—Injunction.——Where the ordinary let out the contract for building a county bridge to one who was not the lowest bidder, the court will enjoin the payment to such contractor of any more than the amount of the lowest bid.—*Crabtree v. Gibson*, S. C. Ga., Feb. 26, 1887; 3 S. E. Rep. 10.

33. CONTRACT — Mortgage — Lien. —— Where, in an agreement between a company, the trustee, under a mortgage of its property and a third party, it is agreed between the company and the third party, but not between the trustee and the company, that the third party shall advance money and have a first lien, the company cannot object to a foreclosure of the mortgage for the benefit of the bondholder and the third party.—*South St. Louis R. Co. v. Plate*, S. C. Mo., June 20, 1887; 5 S. W. Rep. 199.

34. CONTRACT—Testamentary Writing.——An instrument in writing, reading, "at my death my estate or executor pay to A three thousand dollars," cannot be enforced against the executor, though there is a seal attached to the maker's signature—the paper having but one witness thereto.—*Cover v. Sterns*, Md. Ct. App., June 22, 1887; 10 Atl. Rep. 231.

35. CONTRACTS—Variance—Compensation—Reduction.——The plaintiffs built a church for the defendants, but did not fully comply with the contract, but the building was reasonably adapted for the purposes intended, but the changes necessary to make it conform to the contract would be very costly: *Held*, that the defendants could not deduct the cost of making the changes, but only the diminution in value of the building by reason of the deviations.—*Pinches v. Swedish E. L. Church*, S. C. Conn., March Term, 1887; 10 Atl. Rep. 264.

36. CORPORATION—By-laws—Elections—De Facto Officers.——Where the by-laws provide that nothing can be done at a meeting unless a majority of the stock is represented, a majority of all the stock must be represented, though a large part of the stock has never been subscribed for. A board of directors elected at an illegal meeting cannot claim to be *de facto* officers against the old board claiming to hold over.—*Ellsworth W. M. Co. v. Faunce*, S. J. C. Me., June 10, 1887; 10 Atl. Rep. 250.

37. CORPORATION—Equity—Preferred Stock—Jurisdiction.——If the directors of a corporation fail or refuse to pay dividends to holders of preferred stock, when the corporation is bound to pay such dividends, and has the funds to do so, a court of equity has jurisdiction to compel such payment.—*Hazeltine v. Belfast, etc. Co.*, S. J. C. Me., June 6, 1887; 10 Atl. Rep. 328.

38. CORPORATIONS—Illegal Consolidation—Injunction.——A dissenting member of a corporation may maintain a bill to prevent an illegal consolidation of the corporation with another corporation, and obtain an injunction without averring that he has applied in vain to the governing power of the corporation. The injunction will not be dissolved upon the answer of the defendants that the project had been abandoned.—*Nathan v. Tompkins*, S. C. Ala., July 28, 1887; 2 South. Rep. 747.

39. COSTS—Security for—After Judgment.——When a plaintiff has recovered a judgment against a solvent defendant and process to collect it has been issued, it is not proper to require him to give security for costs due a commissioner.—*United States ex rel. v. St. Charles County*, U. S. C. C. (Mo.), June 8, 1887; 31 Fed. Rep. 442.

40. COSTS — Tender — Appeal. —— Where defendant makes a tender, though on the trial and on appeal the plaintiff tenders more than the judgment, yet, if on the final appeal the plaintiff recovers less, the defendant is entitled to costs.—*Williford v. Gadsden*, S. C. S. Car., July 1, 1887; 2 S. E. Rep. 858.

41. COUNTIES — Liability for Negligence. —— Under Code Ga. § 669, a county is not liable for defect in the constitution or for repair or negligence in the management of ferries where no toll is charged.—*Aline v. County of Laurens*, S. C. Ga., Feb. 26, 1887; 2 S. E. Rep. 833.

42. COUNTY COURT — Criminal Jurisdiction. —— The act of 1885 invested the county court of Burnet county with the criminal jurisdiction, of which it was deprived by the act of 1881.—*Galloway v. State*, Tex. Ct. App., May 2, 1887; 5 S. W. Rep. 246.

43. COUNTY OFFICER—Justice of the Peace.——A justice of the peace is a county officer, within the provision of art. 103 Penn. Code.—*Crump v. State*, Tex. Ct. App., June 15, 1887; 5 S. W. Rep. 182.

44. COURTS — Jurisdiction — Citizenship.——If a person residing with his family and doing business in one State goes to another with the view of removing to that State, his temporary residence therein does not change his citizenship.—*State, etc. Ass'n v. Howard*, U. S. C. C. (Mo.), June 8, 1887; 31 Fed. Rep. 433.

45. CREDITOR'S BILL — Attorney's Fees. —— Where conveyances of a debtor are set aside as fraudulent to the suit of a creditor and a sale ordered and made, the creditor's attorney may be allowed a fee out of the proceeds applicable to the demands of creditors, but not out of such balance as would go to the debtor after payment of the debts proved and passed.—*Wagener v. Mars*, S. C. S. Car., July 4, 1887; 2 S. E. Rep. 844.

46. CRIMINAL LAW—Adulteration of Milk—Intent.—— A sale of milk below the statutory standard being established, the intent is immaterial.—*People v. Kibler*, N. Y. Ct. App., July 1, 1887; 12 N. E. Rep. 795.

47. CRIMINAL LAW—Adultery—Evidence—Instruction.——Where, in a trial for adultery, proof of adultery in other counties after the indictment is given, an instruction should be given limiting the effect of such evidence.—*Funderburg v. State*, Tex. Ct. App., May 21, 1887; 5 S. W. Rep. 244.

48. CRIMINAL LAW — Aggravated Assault—Venue—Indictment.——Striking and beating with a pistol in a manner calculated to inflict serious bodily pain and injury does not constitute an aggravated assault. Proof of the offense in an unorganized county attached to another does not suffice for an allegation of venue in the other.—*Miles v. State*, Tex. Ct. App., June 1, 1887; 5 S. W. Rep. 250.

49. CRIMINAL LAW—Arrest—Capias — Jurisdiction—Illegal Arrest — Homicide.——A capias issued by a justice cannot be legally executed in another county till is properly indorsed and then by an officer of that county. A killing by one trying to make an illegal arrest cannot be a less offense than manslaughter.—*Peter v. State*, Tex. Ct. App., June 22, 1887; 5 S. W. Rep. 228.

50. CRIMINAL LAW— Arrest —Jurisdiction—Illegal Arrest — Homicide.——A peace officer has no authority beyond his county to arrest for crime. Homicide in preventing an illegal arrest is generally no higher offense than homicide.—*Sedbetter v. State*, Tex. Ct. App., March 19, 1887; 5 S. W. Rep. 226.

51. CRIMINAL LAW—Arrest—Killing Officer—Impeaching Witness.——An officer without a warrant may arrest one he knows to be charged with a felony, and his killing by the accused while in pursuit is without palliation, though the accused may be innocent. A witness on cross-examination may be asked as to former contradictory statements by him, but if his statements have been reduced to writing and subscribed by him, they must be read to him, or he must be allowed to read them first.—*Floyd v. State*, S. C. Ala., July 14, 1887; 2 South. Rep. 683.

52. CRIMINAL LAW —Arson—Intent—Accomplice.—— Arson, in Texas, is the wilful burning of a house, and a house is any structure inclosed with walls and recovered regardless of the materials used, and the offense is complete when the fire has communicated to it. Though the accused set fire to the jail merely to escape therefrom, he is guilty of arson. Concealment of knowledge of a contemplated felony does not make such party a *particeps criminis* nor necessitate a corroboration of his testimony.—*Smith v. State*, Tex. Ct. App., May 18, 1887; 5 S. W. Rep. 219.

53. CRIMINAL LAW —Bail—Murder—Evidence.——The evidence shows that relator followed deceased in his flight with the stolen horse and arrested him, and that deceased attempted to escape by running, whereupon relator called on him to halt, and fired his gun twice, at least, with no purpose but to frighten him, and at the third shot, which is not shown "by proof evident," to have been fired with intent to kill, killed him: *Held*, that a killing by malice aforethought was not shown, and to refuse bail was error.—*Ex parte, McDowell*, Tex. Ct. App., June 24, 1887; 5 S. W. Rep. 187.

54. CRIMINAL LAW—Change of Venue—Grounds.——A general combination of citizens to suppress crime generally is not a ground for change of venue, and when issue is joined on such application the court can interrogate the witnesses *pro* and *con*.—*Crarey v. State*, Tex. Ct. App., June 22, 1887; 2 S. W. Rep. 162.

55. CRIMINAL LAW —Confessions—Under Arrest— Res Gestæ.——Declarations, though made while defendant was under arrest, if part of the *res gestæ*, are admissible against him. —*Powers v. State*, Tex. Ct. App., Feb. 21, 1887; 5 S. W. Rep. 153.

56. CRIMINAL LAW —Conspiracy—Common Law—Conviction.——An indictment, charging a conspiracy to defraud at common law, is good. A conspirator may be sentenced upon conviction, except when all his coconspirators have been acquitted, or have been discharged under circumstances tantamount to acquittal. —*Bradshaw v. Ter.*, S. C. Wash. Ter., Jan. 21, 1887; 14 Pac. Rep. 594.

57. CRIMINAL LAW — Continuance — Diligence. —— Where, on the eleventh day before the trial, an attachment is taken out for a witness living in a distant county, and the return on the writ shows that the witness had removed to the District of Columbia prior to the officer's receipt of the writ: *Held*, that defendant was not entitled to a continuance, not having shown due diligence, nor that a deposition could not have been procured.—*Hennessey v. State*, Tex. Ct. App., May 18, 1887; 5 S. W. Rep. 215.

58. CRIMINAL LAW—Coroner's Inquests—Admissions—Authentication.——Statements made at an inquest are like testimony taken at an examining trial, and if made voluntarily after being cautioned are admissible against the defendant. The certificates accompanying such evidence should not be incorporated in the statement of facts.—*Kirby v. State*, Tex. Ct. App., Jan. 29, 1887; 2 S. W. Rep. 165.

59. CRIMINAL LAW—Elections — Fraudulent Registration.——Under U. S. Rev. Stat., § 5512, fraudulent registration as a voter in any election in which a member of congress is to be elected, is prohibited and its punishment declared: *Held* that, under this statute, an indictment is good, upon general demurrer, which charges that defendant wrote in the registration book as voters the names of sundry persons who were not voters, the object being to have votes polled in such names.—*United States v. O'Connor*, U. S. D. C. (Mo.), June 3, 1887; 31 Fed. Rep. 449.

60. CRIMINAL LAW — Elections — Indictment — Bill of Exceptions.——In an indictment for tampering with a poll-book, it is sufficient to allege that it was a poll-book or tally-sheet and to set out the alteration, and that to prevent an expression of the will of the people at the election. A bill of exceptions by the prosecuting attorney is simply to determine the law. —*State v. Granville*, S. C. Ohio, June 28, 1887; 12 N. E. Rep. 803.

61. CRIMINAL LAW — Evidence of Other — Larceny — Charge.——Where, on an indictment for larceny, the State is allowed to prove the larceny of other like property at the same time and place, it is error for the court not to give a charge explaining and limiting the purpose for which such evidence was admitted. —*Mayfield v. State*, Tex. Ct. App., June 22, 1887; 5 S. W. Rep. 161.

62. CRIMINAL LAW — Forgery — Indictment. ——An indictment for forgery need not set out the forged instrument by its purport and its tenor, but if it does, any repugnancy between them is fatal.—*Westbrook v. State*, Tex. Ct. App., May 28, 1887; 5 S. W. Rep. 248.

63. CRIMINAL LAW — Indictment.——An indictment which charges the larceny of "one gelding horse of the *price* of $100," instead of using the words of the statute, viz: "of the *value*," is sufficient. Price and value are equivalent words.—*State v. Sparks*, S. C. App. W. Va., June 25, 1887; 3 S. E. Rep. 40.

64. CRIMINAL LAW — Indictments — Matters of Form. ——Matters of form in an indictment or information are amendable before both parties announce themselves ready for trial, but not afterwards.—*Osborne v. State*, Tex. Ct. App., June 1, 1887; 5 S. W. Rep. 251.

65. CRIMINAL LAW—Subornation of Perjury—Accomplice.——The one suborned to commit perjury is not the accomplice of the suborner, and his testimony may convict the suborner.—*U. S. v. Thompson*, U. S. C. C. (Oreg.), June 27, 1887; 31 Fed. Rep. 331.

66. CRIMINAL LAW—Insanity—Premeditation — Weight of Evidence.——Where, in a jury trial, the questions, whether the accused was insane and whether he was guilty of premeditation, were passed on by the jury, and it was a question as to the preponderance of evidence relative thereto, the appellate court will not interfere with the finding of the jury.—*People v. Schuyler*, N. Y. Ct. App., July 1, 1887; 12 N. E. Rep. 783.

67. CRIMINAL LAW—Larceny—Indictment—Ownership — Newly-discovered Evidence. ——It is sufficient to allege that the owner of the stolen propeity was unknown to the grand jury. Newly-discovered evidence relied upon for a new trial must be in fact newly discovered, and that it could not have been discovered in time with due diligence and must, in the light of the evidence, be probably true. —*McVey v. State*, Tex. Ct. App., June 22, 1887; 2 S. W. Rep. 174.

68. CRIMINAL LAW — Larceny — Mistake.——When a person laboring under a mistake as to a particular fact does an act which otherwise would be criminal, he is guilty of no offense.—*Donahoe v. State*, Tex. Ct. App., June 8, 1887; 5 S. W. Rep. 245.

69. CRIMINAL LAW—Manslaughter—Insulting Words—Predicate — Threats.—— The accused, after proving that he was informed that the deceased uttered insulting words about a female relative and that he killed him upon the first meeting thereafter, may prove the utterance of the words to reduce the homicide to manslaughter. Previous threats may be proved as independent evidence, but they are no justification without proof of some attempt made by the deceased to execute them.—*Haward v. State*, Tex. Ct. App., April 13, 1887; 5 S. W. Rep. 231.

70. CRIMINAL LAW — Manslaughter—Insulting Words. ——"D——d son of a b——h," is an expression which does not come within the legal meaning of the terms "insulting words towards a female relative," as those terms are used in the statute defining manslaughter.—*Simmons v. State*, Tex. Ct. App., June 22, 1887; 5 S. W. Rep. 208.

71. CRIMINAL LAW — Murder — Joint Defendants — Threats—Charge.——Where, on a joint trial for murder, threats made by one defendant against the family of the deceased not in the presence of the other defendant, are proved, the charge must restrict such evidence to the case of the defendant who uttered the threats.—*Barron v. State*, Tex. Ct. App., June 11, 1887; 5 S. W. Rep. 237.

72. CRIMINAL LAW—Presumption—From Possession of Stolen Property.——There is no presumption against a defendant because of his possession of stolen property, unless such possession was recent.—*Curlin v. State*, Tex. Ct. App., June 24, 1887; 5 S. W. Rep. 186.

73. CRIMINAL LAW—Receiving Stolen Property.—— Where the charge is that defendant received stolen property from A, knowing it to have been stolen by A, the theft of said property by A becomes a material issue.—*Tucker v. State*, Tex. Ct. App., June 11, 1887; 5 S. W. Rep. 180.

74. CRIMINAL LAW—Res Gestæ—All Witnesses.——It rests in the discretion of the trial court, whether the State be required to call to the stand all the eye-witnesses of the *res gestæ*.—*Wheelis v. State*, Tex. Ct. App., March 18, 1887; 5 S. W. Rep. 224.

75. CRIMINAL LAW—Special Venire—Amending Return —Leading Questions.——The sheriff can be required to amend his return to show due diligence in summoning a special venire. Intellectual weakness is an exception and allows leading questions to be asked the witness.—*Rodriguez v. State*, Tex. Ct. App., June 11, 1887; 5 S. W. Rep. 255.

76. CRIMINAL LAW — Theft — Venue—Possession.—— Theft may be prosecuted in any county through which the thief transported the property. Possession of the property by a servant will support an allegation that it was taken from the possession of the master.—*Clark v. State*, Tex. Ct. App., June 15, 1887; 2 S. W. Rep. 178.

77. CRIMINAL PRACTICE—Delay—Copy of Indictment—Challenges—Jeopardy.——Where a trial is delayed for a week because the parol is exhausted, the accused cannot then demand three days' delay. The trial should have gone on at once and jurors drawn as provided by law, but the accused cannot plead former jeopardy.—*State v. Briggs*, S. C. S. Car., June 29, 1887; 2 S. E. Rep. 854.

78. CRIMINAL PRACTICE — Instructions — Exceptions. ——Exceptions to instructions in a criminal case must be reduced to writing and filed with the clerk before the case is submitted to the jury, or they will be held to be waived.—*Ter. v. O'Brien*, S. C. Mont., July 19, 1887; 14 Pac. Rep, 631.

79. CRIMINAL PRACTICE—Murder— Instructions.—— An instruction, that if the jury have a reasonable doubt whether the defendant is guilty of murder in the second degree, they should find him guilty of manslaughter, is erroneous and entitles the defendant to a new trial.—*Ter. v. Manton*, S. C. Mont., July 29, 1887; 14 Pac. Rep. 637.

80. CUSTODY OF CHILD—Authority of Father.——The authority of the father to dispose of the custody of his child in any other manner than binding him as an apprentice, or appointing a testamentary guardian for him, ceases at the time of his death.—*State v. Reuf*, S. C. App. W. Va., June 25, 1887; 2 S. E. Rep. 801.

81. CUSTOMS DUTIES — Alizarine Assistant. —— Alizarine assistant, the principal ingredient of which is castor oil, is chargeable with a duty of eighty cents per gallon, under § 2499 (similitude clause) of act March 3, 1883.—*Lloyd v. McWilliams*, U. S. C. C. (R. I.), May 23, 1887; 31 Fed. Rep. 261.

82. CUSTOMS DUTIES—Boxes.——If an invoice states that the value of the boxes and other coverings of the goods is included in the amount, and the importer upon making the entry states upon the invoice what that value is, duties can be collected only in the amount of the invoice less the value of the boxes.—*Pryor v. Hauftraft*, U. S. C. C. (Penn.), 1887; 31 Fed. Rep. 443.

83. CUSTOMS DUTIES — Cutlery — Sheep-shears.—— Sheep-shears are cutlery and should pay duty as such. —*Simmons, etc. Co. v. Lancaster*, U. S. C. C. (Mo.), June 8, 1887; 31 Fed. Rep. 445.

84. CUSTOMS DUTIES—Lamps—Smokers' Articles.—— Small lamps, such as are generally used to light pipes and cigars, are "smokers' articles," and should be charged duty as such.—*Wedemeyer v. Lancaster*, U. S. C. C. (Mo.), June 8, 1887; 31 Fed. Rep. 446.

85. DAMAGES —Condemnation Proceedings—Evidence —Malice—Counsel.——One whose property has been illegally taken under defective condemnation proceedings is not, in the absence of malice, entitled to exemplary damages. Declarations of counsel on a former trial are not competent evidence to prove malice. It is the duty of the trial court to restrain counsel and keep them within proper limits in their arguments.—*Baltimore, etc. Co. v. Boyd*, Md. Ct. App., March 10, 1887; 10 Atl. Rep. 315.

86. DEED—Conveyance in Trust—Alienation—Municipal Corporation.——A conveyance of property to the officers of a municipal corporation in trust for the uses and purposes expressed in its ordinances conveys to them an absolute fee simple. A sale by the city officers of its real estate without the notice required by law, but for full value and without fraud or collusion, conveys a good title.—*Newbold v. Glenn*, Md. Ct. App., June 23, 1887; 10 Atl. Rep. 242.

87. DEED—Mortgage—Parol Testimony.——Parol testimony is admissible to prove that an absolute deed was a mortgage, and that the defeasance was agreed upon at the time of the execution of the absolute deed. That the land was a homestead makes no difference.—*First Nat. Bank v. Ashmead*, S. C. Ala., June 15, 1887; 2 South. Rep. 657.

88. DEPOSITION—Publication—Right of Adverse Party. ——Where both parties join in a commission to take depositions and the commission is returned into court, either party may move for publication and neither can object.—*Petrie v. Columbia & G. R. Co.*, S. C. S. Car., June 29, 1887; 2 S. E. Rep. 837.

89. DESCENT—Distribution—Deceased Parent—Debts. ——Under Maryland law, children in the descending or collateral line inherit the share their deceased parent would have taken of the estate of the intestate, not subject to any debt the deceased parent may have owed the intestate.—*Kendall v. Mondell*, Md. Ct. App., June 22, 1887; 10 Atl. Rep. 240.

90. DEVISE — Life Estate — Mortgage —Subrogation— Witness—Deceased Party.——Where property is devised to a trustee to support a person for life with remainder over, a mortgage executed by the *cestui que trust* and the remainderman will not bind the trustee, but the mortgagee is entitled to be re-imbursed for the part of the money used to pay debts of the testator. Where the executor and trustee, now dead, claimed for payments made for the benefit of the estate, the remainderman is incompetent to prove that he himself made the payments, and the entries of the deceased executor on his books in his own favor are not evidence.—*Barnes v. Dow*, S. C. Vt., July 18, 1887; 10 Atl. Rep. 258.

91. EASEMENT—Implied Grant—Sale.——Where the owner makes a part of a tract of land servient to another by an alteration, which is obvious and permanent and necessary for the convenient and comfortable enjoyment of the dominant part, and then conveys one of the parts, his grantee takes the land benefited or burdened by the easement. A drain or artificial watercourse will pass by implication, but not a right of way. —*Kelly v. Dunning*, N. J. Ct. Ch., Aug. 4, 1887; 10 Atl. Rep. 276.

92. EMINENT DOMAIN—Pleading—Trial.——No answer

being authorized under the eminent domain act, the court can compel the parties to go to trial without disposing of the plea of *nul tiel* corporation.—*Henry v. Centralia, etc. R. Co.*, S. C. Ill., June 20, 1887; 12 N. E. Rep. 744.

93. EQUITY — Jurisdiction — Injunction. —— The insolvency of an officer who has collected an illegal tax or fee does not give a court of equity jurisdiction in a suit to recover such fees. To obtain an injunction it must be shown that immediate injury is to be apprehended. The fact that the law authorizing a tax is unconstitutional does not, of itself, authorize a court of equity to prevent the collection of the tax.—*Crawford v. Bradford*, S. C. Fla., July 30, 1887; 2 South. Rep. 782.

94. EQUITY — Multifariousness — Fraud—Rescission of Contract—Compromise Contract.——A bill in equity is not multifarious because it prays an alternate relief inconsistent with the specific relief asked for. A court will set aside a contract on the ground of mental incapacity of one of the parties, but it will not sanction a rescission of a contract between competent parties except for fraud. Circumstances stated under which a son who has contracted to support his parents will be required to do so.—*Korn v. Korn*, S. C. App. W. Va., June 25, 1887; 3 S. E. Rep. 17.

95. EQUITY — Practice—Res Judicata—Slave.——If a bill in equity for a legacy is dismissed upon general demurrer, such dismissal will not bar a new suit by the same party for the same cause of action, especially if new parties are introduced. Any contract made by a slave is null and void.—*Woodland v. Newhall*, U. S. C. C. (Va.), 1887; 31 Fed. Rep. 434.

96. EQUITY—Specific Performance—Statute of Frauds. ——Where A and B agreed that B should purchase certain land at sheriff's sale, and that A should have a certain portion at an agreed price, and that A went into possession and remained there till his death, paying a portion of the price, and his heir offering to pay the balance: *Held*, that specific performance of the contract be enforced.—*Martin v. Patterson*, S. C. S. Car., June 28, 1887; 2 S. E. Rep. 859.

97. EVIDENCE—Newly-discovered Evidence—Cumulative—New Trial.——When in an action to recover the price of a mule, the verdict and judgment are against the defendant, although he testified that he had returned the mule in satisfaction of the debt, it was held that evidence that plaintiff had subsequently offered to sell the mule, although newly discovered, is only cumulative and will not authorize a new trial.—*Hart v. Jackson*, S. C. Ga., Feb. 8, 1887; 3 S. E. Rep. 1.

98. EXECUTION—Attorney and Client.——Where an attorney accepts property in part payment of a claim in his hands for collection, his title to it is perfect and it cannot be levied on as the property of his client, under a judgment obtained subsequently to that transaction. Nor is it material whether the client had or had not ratified the attorney's action.—*Husch v. Fleming*, S. C. Ga., Feb. 26, 1887; 3 S. E. Rep. 9.

99. EXECUTORS — Distribution — Suit Against Distributees.——A creditor who has obtained a judgment against an administrator to be paid from the estate of the deceased, and on an execution thereunder a return of *nulla bona* has been made, cannot proceed against the distributees of the estate till he shows that he has exhausted all his remedies against the administrator and his sureties.—*Tift v. Collier*, S. C. Ga., Feb. 26, 1887; 2 S. E. Rep. 943.

100. EXECUTION—Lien on Vessel—Claimant. ——The proceedings to enforce liens on home vessels, etc., are at law. The proceedings, when a claimant intervenes for property seized on execution, are to determine whether the claimant has the better title; he cannot object to the regularity of the proceedings.—*Baars v. Creary*, S. C. Fla., June 21, 1887; 2 South. Rep. 662.

101. EXECUTORS—Sale of Realty—Divesting Title.—— When decedent's lands are sold for distribution under order of the probate court, the title of the heirs is not divested till the purchase money is paid in full.—*Gardner v. Kelsoe*, S. C. Ala., Jan. 11, 1887; 2 South. Rep. 680.

102. EXEMPTION—Conversion—Investment.——When damages are recovered for a conversion of exempt property, the parties entitled to the exempt property have the same right to the damages that they had to the property itself. The party seizing it has no right to have the damages so invested that he can seize it upon the expiration of the exemption right.—*Harrell v. Harrell*, S. C. Ga., Feb. 26, 1887; 3 S. E. Rep. 12.

103. EXTORTION—Justices of the Peace—Fees—Constitutional Law.——It is not extortion in a justice of the peace to demand in a criminal case from the complainant payment of the fees to which he is entitled, but he cannot refuse, because his fees are not paid, to perform his duty. A statute of New Jersey declared void because its title is misleading and does not express the object of the statute.—*Lanc v. State*, N. J. Ct. Err. & App., June Term, 1887; 10 Atl. Rep. 360.

104. FRAUDULENT CONVEYANCES — Corporation — Assignment—Allegation of Fraud—Multifariousness.—— An insolvent corporation, which has ceased to do business, may prefer a creditor in an assignment for the benefit of creditors. In an allegation of fraud the facts constituting it must be set out. An improper charge, which does not state a new cause of action, does not render the bill multifarious.—*Pyles v, Riverside F. Co.*, S. C. App. W. Va., June 29, 1887; 2 S. E. Rep. 909.

105. FRAUDULENT CONVEYANCE — Relationship — Possession.——A debtor, six days before a judgment against him, conveyed all his property to his brother on an alleged debt of ten years' standing, who, the next day, conveyed to the debtor's wife and children, the debtor and this family residing all the time on the property: *Held*, that the deed was fraudulent.—*Gordon v. McIlwain*, S. C. Ala., June 14, 1887; 2 South. Rep. 671.

106. FRAUDS—Statute of—Performance Within a Year —Resulting Trust. ——Where A advances money to pay for land purchased by B, and the title is taken in A's name for security, and B is to repay the money within a year, and during an extension of time for repayment A pays the rest of the money without B's knowledge, and B is ready to return all the money, but A will give no statement thereof: *Held*, that a resulting trust existed in favor of B, though the contract between A and B was never reduced to writing as agreed.—*Ward v. Matthews*, S. C. Cal., June 30, 1887; 14 Pac. Rep. 604.

107. GIFT—Delivery—Possession.——If a father gives his daughter residing with him a colt, of which she has only possession at his home, and she afterwards exchanges the colt for a mare, the mare is her property.—*Lowther v, Lowther*, S. C. App. W. Va., June 29, 1887; 3 S. E. Rep. 42.

108. GUARDIAN — Investment — Liability. —— The taking of a second mortgage by a guardian is not to be approved of, but it depends upon the circumstances of each case whether it is a breach of trust.—*Monroe v. Osborne*, N. J. Ct. Err. & App., June Term, 1887; 10 Atl. Rep. 267.

109. GUARDIAN — Sale — Contingent Remainder — Decedent—Creditors.——The contingent remainder of a minor in real estate may be sold by order of court upon petition, and creditors of the decedent, under whom the minor claimed it as a devisee, cannot, after three years from the grant of letters testamentary, apply for a sale of that land to satisfy a debt of the estate.—*In re Stevens*, N. Y. Ct. App., June 7, 1887; 12 N. E. Rep. 759.

110. HABEAS CORPUS—Special Tribunal—Immigrant.— Upon *habeas corpus* the proceedings of a special tribunal, *i. e.*, commissioner of immigration, may be examined to see whether he has kept within his statutory powers. Such a commissioner cannot detain an immigrant, unless, upon examination, he proves to be a convict, lunatic, idiot or person incapable of taking care of himself.—*In re Sullivan*, U. S. C. C. (N. Y.), June 14, 1887; 31 Fed. Rep. 447.

111. HOMESTEAD—Insurance—Premium — Exemption. ——The proceeds of insurance upon a homestead are exempt, and the owner can use his own means to procure the insurance, regardless of his creditors.—*Bemheim v. Davitt*, Ky. Ct. App., June 11, 1887; 5 S. W. Rep. 193.

112. HOMICIDE—Instructions—Error.——Where, in a trial for homicide, the trial court may have so instructed the jury as to withdraw the question whether a confession was voluntary or not, the supreme court will not reverse the judgment if it is manifest from the whole record that the verdict of guilty was correct.—*Pascal v. State*, S. C. Ga., Feb. 26, 1887; 3 S. E. Rep. 2.

113. HUSBAND AND WIFE—Contract—Action. —— A married woman requested A to perform professional services in regard to her separate estate, to which request the husband verbally assented: *Held*, that A could not maintain an action against either for the value of his services.—*Maulsby v. Byers*, Md. Ct. App., June 22, 1887; 10 Atl. Rep. 235.

114. INJUNCTION—Condition in Deed—Remedy at Law. ——A conveyed land to B with a condition of forfeiture in case intoxicating liquors were sold thereon. B sold a part of the property and then commenced to sell liquor on his remaining lot: *Held*, that A could enjoin B, though he had a remedy at law by forfeiture.—*Richards v. Burdsall*, N. J. Ct. Ch., Aug. 2, 1887; 10 Atl. Rep. 274.

115. INJUNCTION — Delay of Parties.——Where the plaintiff, who has enjoined defendant's judgment, neglects for an unreasonable time to summon other defendants, who are necessary parties, or to amend his bill or to have an order of publication, the court will, on motion of defendant, even before answer filed, dissolve the injunction.—*McCoy v. McCoy*, S. C. App. W. Va., June 25, 1887; 2 S. E. Rep. 809.

116. INJUNCTION—Dissolution— County-seat—Statutes. ——In proper cases, a court of equity will dissolve an injunction, although all the defendants have not answered. Construction of Florida statutes with reference to county-seats, changes thereof and elections held for deciding questions relating thereto. — *Douglass v. County Commrs.*, S. C. Fla., July 30, 1887; 2 South. Rep. 776.

117. INJUNCTION — Judgment — Certainty — Equity — Homestead.—— A bill seeking to enjoin a judgment and execution is demurrable if it does not describe the judgment and execution with certainty, so as to distinguish them from other judgments. Irregularity in obtaining a judgment is not adequate ground for collateral attack. Construction of Florida homestead law.—*Adams v. White*, S. C. Fla., July 30, 1887; 2 South. Rep. 774.

118. INSURANCE—Renewal — Condition — Waiver.—— Where the agent of an insurance company renews a policy by giving credit for the premium, contrary to the terms thereof, the company knowing that such was his custom, and accepting his act, the condition is waived. In such case the policy is renewed, though by agreement the agent retains the signed receipt.—*Tennant v. Travelers' Ins. Co.*, U. S. C. C. (Cal.), April, 1887; 31 Fed. Rep. 322.

119. INSURANCE—Representations— Incumbrances.—— A statement as to the amount of incumbrance on property in an application for insurance which fail to state the amount due thereon by mortgage is justifiable, if the amount stated is the amount for which the mortgagees have agreed to hold that piece of property liable, looking to other property for the balance of the debt.—*Mutual, etc. Co. v. Gordon*, S. C. Ill., June 20, 1887; 12 N. E. Rep. 747.

120. INSURANCE—Statute—Constitutional Law—Title of Act.——The statute of Michigan providing for the incorporation of mutual fire insurance companies and repealing two prior statutes declared constitutional, as it does not infringe the rule that a statute must have but one object, and that must be expressed in its title. Circumstances stated in which an insurer in a mutual fire insurance company is not liable for assessments after the cancellation of his policy.—*Polford v. Church*, S. C. Mich., June 25, 1887; 33 N. W. Rep. 913.

121. INTOXICATING LIQUORS—Local Option—Legality. ——In prosecutions for violating the local option law, it must be proved and must appear in the record on appeal that the order of the commissioners' court appointing the election whereat prohibition was adopted was based upon a legal petition.—*Carners v. State*, Tex. Ct. App., June 1, 1887; 5 S. W. Rep. 133.

122. JUDICIAL AND ADMINISTRATIVE OFFICERS. —— The administrative and not the judicial officers of the government should, if it is necessary to employ spies and informers to bring offenders to justice, employ them.—*In re Gilbert*, U. S. C. C. (N. Y.), April 1, 1887; 31 Fed. Rep. 277.

123. JUDGMENT—Set-off—Attorney's Lien. —— Where a judgment debtor files a bill to have a judgment against the plaintiff set-off against the judgment rendered against himself, the creditor's attorney is a necessary party, for he has a lien on the judgment for his fees which is superior to all other liens, except for taxes.—*Caudle v. Rice*, S. C. Ga., Feb. 26, 1887; 3 S. E. Rep. 7.

124. JURISDICTION—United States Courts.——Where plaintiff is a citizen of Massachusetts and defendant is a corporation, created by the laws of Rhode Island and by the law of Massachusetts, a suit may be brought in the federal court for the Rhode Island district.—*Page v. Fall River Co.*, U. S. C. C. (R. I.), June 24, 1887; 31 Fed. Rep. Rep. 257.

125. JURISDICTION—Receiver—Action Against—Injunction.——A plea to the jurisdiction is first in order; if the defendant files any other plea he confesses the jurisdiction and waives that plea. The immunity of receivers appointed by courts of equity from suits at law is not jurisdictional. Courts of equity can protect their officers by enjoining parties from proceeding with their suits, but cannot affect the courts.—*Lyman v. Central, etc. Co.*, S. C. Vt., Aug. 15, 1887; 10 Atl. Rep. 246.

126. LEGACY—Specific Fund.—— A gave legacies to his brothers "out of the portion or share of my father's estate that may come to me:" *Held*, that on a deficiency of such portion that the brothers could not resort to the general personal estate of A to make up the deficiency.—*Gelbach v. Shively*, Md. Ct. App., June 23, 1887; 10 Atl. Rep. 247.

127. LIMITATION OF ACTIONS—Abandoned Property—Claims Against the United States.——Since the money from sales of abandoned property has been covered into the treasury under congressional resolution, no trust therefore arises in favor of prospective claimants. All claims against the United States cognizable in the court of claims are barred in six years, though arising after the passagge of the law.—*Rice v. United States*, U. S. S. C., March 7, 1887; 7 S. C. Rep. 1377.

128. LIMITATIONS—Promise to Marry — Pleading.—— An action for breach of a promise to marry is barred after the lapse of one year. If a proper plea is rejected by the trial court the appellate court will reverse the judgment, unless it appears affirmatively by the record that the defendant was not prejudiced by the rejection of his plea.—*Flint v. Gilpin*, S. C. App. W. Va., June 28, 1887; 3 S. E. Rep. 33.

129. MARRIAGE—Cohabitation—Color of Title—Limitations.——Where a man marries a second wife, who does not know that he is already married, and continues to live with her till his death, the first wife having long before obtained a divorce, such continued cohabitation does not raise even a presumption of a common law marriage, and the issue are illegitimate. In a suit for partition by the heirs of the husband against one in possession claiming as heir of the illegitimate offspring, such adverse possession to be a bar must continue for twenty years. —*Cartright v. McGown*, S. C. Ill., June 17, 1887; 12 N. E. Rep. 737.

130. MARRIAGE—Validity — Common Law Marriages—Statute.——A common law marriage contracted in West Virginia is not valid in that State, nor is any

marriage contracted in that State which is not solemnized in the manner prescribed by the statute.—*Beverlin v. Beverlin*, S. C. App. W. Va., June 25, 1887; 3 S. E. Rep. 36.

131. MARRIED WOMAN—Payment of Husband's Debts —Recovery of.——If a married woman consents to the application of her money to the payment of her husband's debts, she cannot reclaim such money.—*Warwick v. Lawrence*, N. J. Ct. Err. & App., June Term, 1887; 10 Atl. Rep. 376.

132. MASTER AND SERVANT — Injury — Liability.—— Where there is a question, whether the injury was due to the servant's own negligence or to that of a fellow-servant, under the Iowa law, the case should go to the jury.—*Chicago, etc. R. Co. v. McLaughlin*, U. S. S. C., Dec. 20, 1886; 7 S. C. Rep. 1366.

133. MASTER AND SERVANT—Negligence—Injury.—— The fact that a brakeman was injured on a passenger train, to which he was transferred for the run, owing to dangers due to the season, of which he was advised, does not render the company liable.—*Adkins v. Atlanta R. Co.*, S. C. S. Car., June 29, 1887; 2 S. E. Rep. 849.

134. MASTER AND SERVANT—Negligence—Presumption —Hearsay.——In case of injury of a servant, the presumption of negligence by the master does not arise, and it must be shown that the servant was using due care and was free from fault. In such a case a statement made shortly after the accident by the conductor, stating what the engineer told him, and the statement of the injured servant made shortly before his death, but not at or about the time of the accident, are inadmissible.—*East Tenn., etc. R. Co., v. Maloy*, S. C. Ga., Feb. 26, 1887; 2 S. E. Rep. 941.

135. MINING CLAIM — Following Dip — End-lines.—— When a mining claim is laid across the vein, the side-lines become the end-lines relative to following the dip. —*Argentine M. Co. v. Timble M. Co.*, U. S. S. C.. May 27, 1887; 7 S. C. Rep. 1356.

136. MORTGAGE—Accounting.——Where a mortgagor had an interest in the estate of his deceased mortgagee, the court would not permit such interest to be taken into the account and allowed to the mortgagor upon a general accounting.—*La Crosse, etc. Bank v. Thompson*, S. C. Minn., June 15, 1887; 33 N. W. Rep. 907.

137. MORTGAGE—Priority—Reinscription.—— An ancient debt secured by a mortgage duly kept alive and finally acknowledged by a notarial act, duly recorded in the parish where the land lies, is entitled to priority over a debt subsequently secured by a mortgage acknowledged and recorded. And it is immaterial that the older debt was not reinscribed within ten years.—*Hart v. Caffrey*, S. C La., July 6, 1887; 2 South. Rep. 788.

138. MORTGAGE — Recording—Statute.——The South Carolina statute of 1876, authorizing mortgages to be recorded at a time more than thirty days after their execution, to take effect from the date of their recording, does not authorize the recording of mortgages executed before January 1, 1887. Such a mortgage, recorded more than thirty days after its execution, is void as to a purchaser without notice.—*Bloom v. Simms*, S. C. S. Car., July 4, 1887; 3 S. E. Rep. 45.

139. MUNICIPAL CORPORATIONS—Board of Public Works Negligence—Liability.——Where a city is authorized to tax to improve a highway in the city under the direction of the board of public works, it is liable for an injury to the premises of an abutting property owner by their negligence.—*Johns v. City of Cincinnati*, S. C. Ohio, June 28, 1887; 12 N. E. Rep. 801.

140. MUNICIPAL CORPORATIONS—Public Improvements —Special Law.——The act of March 18, 1885, providing for public improvements in municipalities, is not a special law, and is constitutional.—*Thomason v. Ashworth*, S. C. Cal., July 2, 1887; 14 Pac. Rep. 615.

141. MUTUAL BENEFIT ASSOCIATION — Railroad — Release—Defense.——A rule of a mutual benefit association that the benefits accruing from the death of one killed by a railroad shall not be paid until the persons legally entitled to damages therefor have released the railroad, is not void, and a recovery of damages is a good defense to a suit on the contract.—*Fuller v. B. & O., etc. Assn.*, Md. Ct. App., June 22, 1887; 10 Atl. Rep. 237.

142. NEGLIGENCE — Contributory Negligence.——Circumstances stated under which an employee of a railroad, who knew the danger of a particular place in the road, allowed himself to be put off by vague and contingent promises of repairs, and was finally hurt at that place, was held guilty of contributory negligence.—*Wilson v. Winona, etc. Co.*, S. C. Minn., July 29, 1887; 33 N. W. Rep. 908.

143. NEGLIGENCE — Injuries — Liability.—— Where a stevedore was hurt by the breaking of a rope, which caused a bucket to fall on him, when he had been advised for other reasons not to stand under it, his duty being in connection with it, and the master had been informed of the weak condition of the rope: *Held*, that the question of liability was for the jury.—*Cunard, etc. Co. v. Carey*, U. S. S. C., Nov. 13, 1886; 7 S. C. Rep. 1360.

144. NEGLIGENCE—Latent Defects.——Where a vessel is constructed and equipped in the mode usual with vessels of her class, and approved by competent judges, the owners are not responsible as for negligence for accidents caused by latent defects.—*Hurley v. The Lizzie Frank*, U. S. D. C. (Ala.), July 5, 1887; 31 Fed. Rep. 477.

145. NEGLIGENCE—Tug and Tow.——A tug going out to sea with a tow, when no storm signals were up and when other tugs and ships were going out, is not liable as for negligence because the tow broke loose and was lost in consequence of a very violent storm which set in suddenly.—*National, etc. Co. v. The Argus*, U. S. D. C. (Del.), June 25, 1887; 31 Fed. Rep. 481.

146. NEGOTIABLE INSTRUMENTS — Indorsement — Agency.——Where one of two payees of a draft received and handed it to the other, with instructions how to apply his share of the proceeds, and the latter indorsed both names and transferred it to a third person in payment of his own debt, such third person being without actual notice is not liable to the first holder for his share.—*Mars v. Mars*, S. C. S. Car., July 8, 1887; 3 S. E. Rep. 60.

147. OFFICER—De Facto Officer—Rights of—Liability of —Limitations.——A *de facto* officer may recover damages from one who, with no better right, excludes him from the office. He is responsible to the rightful officer for the fees and perquisites received by him during his incumbency of the office. Ruling on the statute of limitations in such cases.—*Bier v. Gorrell*, S. C. App. W. Va., June 28, 1887; 3 S. E. Rep. 30.

148. PARTNERSHIP—Action for Settlement—Pleading.— In an action by one partner against his co-partners for a full and final settlement, a prayer that the liquidating partner shall render an account is not inconsistent with, but incidental to the general prayer. A plea of full settlement is not sustained by proof which only shows a partial settlement.—*Thompson v. Walker*, S. C. La., July 7, 1887; 2 South. Rep. 789.

149. PARTNERSHIP—Sale—Power of Partner.—— One partner in the course of trade and by a fair sale may, by one contract, sell all the partnership property.—*Ellis v. Allen*, S. C. Ala., June 29, 1887; 2 South. Rep. 676.

150. PATENTS — Assignment. —— An assignment of one-third interest in an invention according to a specification to be presently filed, conveys one-third of everything set forth in such specification and of the patents obtained under it, including patents subsequently obtained for improvements, not requiring invention, in the devices described in such specification. *Puetz v. Bransford*, U. S. C. C. (Mo.), May 16, 1887; 31 Fed. Rep. 458.

151. PATENTS—Barbers' Chairs—Equivalents.——The doctrine of mechanical equivalents must be kept within reasonable limits: *Held* that, defendant using two of the elements of plaintiff's combination of old devices, did not infringe his patent reissue, No. 7,320.—*Archer v. Arnd*, U. S. C. C. (Mo.), June 20, 1887; 31 Fed. Rep. 475.

152. PATENTS — Bell-ringers. —— Letters patent No.

154,394 to Charles H. Hudson, do not infringe patent 127,933 to the assignee of George B. Snow for improvement in steam bell-ringers.—*Snow v. Lake Shore, etc. Co.*, U. S. S. C., May 2, 1887; 7 S. C. Rep. 1343.

153. PATENTS—Combination—Novelty. —— Each element of the combination patented in letters patent No. 185,862 was known in art prior to the invention, but the combination in its entirety has never been produced. It had been received by the trade as a patented article, and had previously been recognized as such by the defendant: *Held*, that the patent was not void for want of patentable novelty.—*Hill v. Sawyer*, U. S. C. C. (N. Y.), June 17, 1887; 31 Fed. Rep. 282.

154. PATENTS—Equivalents.——Where there are several patents for combinations, all producing the same result, but different in their forms of combinations, the doctrine of equivalents does not apply.—*Hill v. Sawyer*, U. S. C. C. (N. Y.), June 17, 1887; 31 Fed. Rep. 282.

155. PATENTS—Flying Targets.——The "flying targets" for which patent No. 231,419 was issued are not of the same kind of material or shape as those for which patent No. 311,768 was granted. Consequently the latter patent is not an infringement of the former.—*American, etc. Co. v. Ligowski, etc. Co.*, U. S. C. C. (Ohio), 1887; 31 Fed. Rep. 466.

156. PATENTS—Ice Machine—Infringement.——Patent No. 148,675 *held* to be infringed as to its second claim by patent No. 228,364, both being for ice-making and refrigerating machines.—*Cincinnati, etc. Co. v. Fosse-Schneider Co.*, U. S. C. C., June 2, 1887; 31 Fed. Rep. 469.

157. PATENTS—Piston-rod Packing. —— The defendant, after being restrained by injunction, made a packing with a changed form of disks, one having a concial projection and the other a beveled edge, fitting over the projection: *Held*, that he infringed reissued patent No. 9,365, to Martin Schneble.—*U. S. Met. P. Co. v. Tripp*, U. S. C. C. (Mass.), June 11, 1887; 31 Fed. Rep. 350.

158. PAYMENT—Presumption of—Lapse of Time—Care of Documents.——Where one claiming to be the assignee of certain mortgages, made in 1853, and assigned to him in 1866, testifies that the agreements and assignment of the mortgages were eaten by rats, it will be presumed from the lapse of time that the mortgages had been paid off.—*Ward v. Greiulds*, N. J. Ct. Ch., Aug. 8, 1887; 10 Atl. Rep. 374.

159. PHYSICIAN—Action for Fees.——In an action by a physician to recover his fees, it was held that, even if he had mistaken the care and treated his patient for a disease which he did not have, he could nevertheless recover, unless it appeared that he did not exercise proper care and skill as a physician.—*Ely v. Wilbur*, N. J. Ct. Err. & App., June Term, 1887; 10 Atl. Rep. 358.

160. PLEADING—Affidavit of Defense.——An affidavit of a defense is insufficient if it merely states that the due bill and note were given at the request of the plaintiff, who wanted something to show the nature of the transaction in case of death.—*Garseed v. Rutter*, S. C. Penn., April 5, 1887; 10 Atl. Rep. 357.

161. PLEADING—Amendment.——If, in an action of ejectment, defendant claimed an allowance for improvments, alleging that he believed at the time he bought he was getting a good title, the evidence established such belief at the date of making the improvement: *Held*, that defendant might be allowed to amend his answer by averring a belief of the latter date.—*McKnight v. Cooper*, S. C. S. Car., July 4, 1887; 2 S. E. Rep. 842.

162. PLEADING—Declaration.——A declaration must state clearly, methodically and precisely the facts upon which the plaintiff founds his action, so that the defendant may know exactly what he is to answer. A declaration failing on any of these points is bad on general demurrer.—*White v. Romans*, S. C. App. W. Va., April 8, 1887; 3 S. E Rep. 14.

163. PLEADING—Defect in Count—How Availed after Demurrer.——Where there is a single count, containing matter which will sustain an action, and also matter on which no recovery can be had, if no demurrer be had to such bad portion the defendant may yet object to any evidence to such matter, or he may move to exclude such evidence or ask an instruction to the jury to disregard it; or, if there is a general verdict against him, he may move to set it aside, and if it clearly appears that the verdict is excessive the court should set aside the verdict and grant a new trial, and if the evidence be certified on writ of error the appellate court will disregard the evidence and reverse the case.—*Robecht v. Marling*, S. C. App. Va., June 25, 1887; 2 S. E. Rep. 827.

164. PLEADING—Demurrer — Signing as Agent.——A complaint alleging that defendant promised, through his agent, to plaintiff $460 by a note signed by G in his own name as agent, is good on demurrer.—*Tarver v. Garlington*, S. C. S. Car., July 4, 1887; 2 S. E. Rep. 846.

165. PLEDGE—Stock—Transfer—Corporate Book—Statute.——Under the statutes of Dakotah, no transfer of stock in any corporation shall be valid except as between the parties until the same has been entered on the books of the corporation. Construction of Dakotah law as applicable to the pledge of stock.—*Van Cise v. Merchants', etc. Bank*, S. C. Dak., May 26, 1887; 33 N. W. Rep. 897.

166. POWERS.——A deed signed by an attorney, in fact in his own name as attorney for the grantors, is defective in execution, but it is good in equity as an execution of a power, and will vest the equitable title in the grantees.—*Ramage v. Ramage*, S. C. S. Car., June 28, 1887; 2 S. E. Rep. 834.

167. PRACTICE — Best Evidence — Telegram. ——To prove that a witness on the stand received a certain telegram from an absent witness, it is not necessary to produce the telegram itself, it may be proved by parol. —*Connor v. State*, Tex. Ct. App., May 21, 1887; 5 S. W. Rep. 189.

168. PRACTICE—Jurors—Competency.——The pendency of a criminal prosecution for assault against a juror, wherein no plea has been filed, does not render him incompetent to serve in the trial of a cause.—*Hodges v. Lassiter*, S. C. N. Car., June 3, 1887; 2 S. E. Rep. 923.

169. PRACTICE—Law and Equity—Vendor's Lien.—— Equitable relief may be had in common law proceedings. Such proceedings may be commenced twenty days before the term of the court. One who has given a bond for title may have the land sold to satisfy the notes for the purchase price.—*Littleton v. Spell*, S. C. Ga., Feb. 26, 1887; 2 S. E. Rep. 935.

170. PRACTICE—New Trial—Void Verdict—Amendment Without Permission. ——When the verdict is too ambiguous the court may declare it void without regard to the number of trials already had and grant a new trial. An amended declaration filed without an order of court cannot be considered a part of the record.—*Williams v. Ewart*, S. C. App. W. Va., April 2, 1887; 2 S. E. Rep. 881.

171. PRACTICE — Statutes — Construction — Appeal — Insufficiency.——Sections 772 and 804 of the Revised Statutes, relating to the District of Columbia, must be construed according to New York divisions. A motion for a new trial because the verdict is against the weight of evidence may be heard by the trial judge, and a denial of the motion may be reviewed on appeal by the general term of the court. Evidence is insufficient in law when there is a total absence of the proper evidence; it is sufficient in fact, when the evidence adduced is overcome by opposing evidence.—*Metropolitan R. Co. v. Moore*, U. S. S. C., May 2, 1887; 7 S. C. Rep. 1334.

172. PRINCIPAL AND AGENT—Profits of Agent—Negotiable Instruments—Equities.——The profits made by an agent in executing his agency insure to his principal. If an agent buys up the paper of his principal at a discount, the principal is entitled to the benefit of such discount. If he receives from his principal notes for such paper so bought up, and assigns them before maturity to a *bona fide* purchaser, without notice, for a valuable consideration, such purchaser holds them clear of all the equities which the maker has against his

agent.—*Noyes v. Langton*, S. C. Vt., Aug. 5, 1887; 10 Atl. Rep. 242.

173. PROBATE COURT — Partition — Jurisdiction.——The power of probate courts to make partition is incident to the power of settling estates. After an estate has been settled and the land has passed out of the hands of the court, it has no jurisdiction to entertain an action for partition.—*Hurley v. Hamilton*, S. C. Minn., June 28, 1887; 33 N. W. Rep. 912.

174. PROMISSORY NOTE—Agent —Pleading—Burden of Proof.——A promissory note payable to an agent as such is, in effect, payable to the principal. Either can sue upon it. A plea of *non est factum* does not throw the burden of proof on the plaintiff but merely lets in the defendant's defense.—*Martin v. Lamb*, S. C. Ga., Feb. 26, 1887; 3 S. E. Rep. 10.

175. PROMISSORY NOTE—Notice of Dishonor—Inquiry—If one takes a note after it it done, the fact that it has not been paid at maturity is evidence of its dishonor, and if there are several notes so purchased, which are due at different times, but constitute one transaction, the fact that one due note is unpaid puts the purchaser upon inquiry as to the others and charges him with all the equities between the original parties.—*Harroll v. Broxton*, S. C. Ga., Feb. 26, 1887; 3 S. E. Rep. 5.

176. QUO WARRANTO—Attorney-general— Corporation. ——A *quo warranto* against the officers of a corporation must be filed in the name of the attorney-general alone. It cannot be joined to an information by a private person.—*State exr el. v. Mayor, etc.*, S. C. N. J., Aug. 6, 1887; 10 Atl. Rep. 377.

177. QUO WARRANTO — Mandamus — Officer — Statute. ——*Quo warranto* and not *mandamus* is the proper remedy to try the title of one actually in possession of an office under color of law. Construction of statutes of Maine concerning the office of marshal of the city of Lewiston.—*French v. Cowan*, S. J. C. Me., June 9, 1887; 10 Atl. Rep. 335.

178. RECORD—Copy—Defective Acknowledgment.—— A mortgage defectively acknowledged or proved cannot be proved by a certified copy of its record without proof of the extension of the original, though not denied by verified plea.—*Campbell v. O'Neal*, S. C. Ala., Feb. 22, 1887; 2 South. Rep. 668.

179. REMOVAL OF CAUSE—Federal Question— Liquor Law.——In a suit under the State law, which provides, that a building where intoxicating liquors are disposed of contrary to law is a nuisance and may be abated by a suit in equity, no federal question is involved.—*Schmidt v. Farley*, U. S. S. C., Oct. 25, 1886; 7 Sup. Ct. Rep. 1373.

180. REVENUE LAWS—Reappraisement.——*Held*, that to charge the importer with the fee of the merchant appraiser, appointed under § 2930 Rev. Stat. United States where the importer is dissatisfied with the original appraisement, is an unlawful charge.—*Hedden v. Icelin*, U. S. C. C. (N. Y.) June 28, 1887; 31 Fed. Rep. 266.

181. RIVERS — Navigable Rivers—Ice—Public Rights—Private Occupation. ——The right to travel over the ice on a navigable river is not absolute, nor is the right to take ice therefrom. Both rights are comparative only, and to what extent each can be exercised at a particular place depends upon the benefit the public receives therefrom. Ruling as to the rights of the proprietor of an ice-field and of a person traveling thereon.—*Woodman v. Pillman*, S. J. C. Me., June 16, 1887; 10 Atl. Rep. 321.

182. SALE —Administrator's Sale—Real Estate—Collateral Attack.——A sale made by an administrator of the real estate of his intestate under the license of the proper court, the record being regular, cannot be set aside upon a collateral attack showing that in reality there were no debts against the estate.—*Curran v. Kuby*, S. C. Minn., July 29, 1887; 33 N. W. Rep. 907.

183. SALE —Rescission—Vesting of Title.——Where A sells to B a cow for a stipulated price per pound, and sends B a written memorandum of the sale and an order for the cow, the sale is complete and the title vests in B; but if before delivery A discovers that the cow is with calf, both parties having theretofore been satisfied that she was barren, he has a right to rescind the contract, as the cow's value if she would breed was ten times as great as it would be if she were barren.—*Sherwoood v. Walker*, S. C. Mich., July 7, 1887; 33 N. W. Rep. 919.

184. SHIPPING—Damage to Cargo—Burden of Proof. ——If a ship is charged with damage to cargo from leaks, the burden of proof is on the ship to show a sea-peril adequate to produce such leaks in a sea-worthy ship. If it be shown that the ship was sea-worthy and that no leak appeared until just before arrival after a week of bad weather, it is sufficient.—*Windmiller v. The Thomas Melville*, U. S. D. C. (N. Y.), June 3, 1887; 31 Fed. Rep. 486.

185. SHIPPING — Negligence—Leaks– Burden of Proof. ——A carrier who stipulates not to be liable for loss by leaks or breakage is protected by his contract, unless it appears that by his negligence or misconduct he contributed to the loss. The burden of proof to show this is upon the shipper.—*Flake v. The Jefferson*, U. S. C. C. (Tex.), March, 1887; 31 Fed. Rep. 489.

186. SHIP — Owners—Advances—Payment.——Agents advanced money at a ship-owner's request, and at his cost and for his benefit took out insurance on such advances, and agreed to apply the insurance money, when received, to the debt for advances. *Held*, that the receipt of the insurance money by the agents extinguished the debt, and that the insurance company could not by the doctrine of subrogation maintain an action against the owners to recover the advances.—*Phenix Ins. Co. v. Chadbourne*, U. S. C. C. (Mass.), 1887; 31 Fed. Rep. 300.

187. STATUTES—Enactment—Authentication.——A bill not authenticated as required by § 17, art. 2, Const., is not a law.—*State v. Kiesewetter*, S. C. Ohio, June 28, 1887; 12 N. E. Rep. 807.

188. STREET RAILROAD.——Where the city limits extend across a river and a street runs to and across a bridge spanning the river, a street railroad company having the right to lay its tracks on the streets of the city may also lay them across the bridge, although that had been built by the county.—*County of Floyd v. Rome, etc. Co.*, S. C. Ga., March 5, 1887; 3 S. E. Rep. 3.

189. SUPREME COURT—Washington Territory—Judges —Disqualification.——A judge who has only made interlocutory orders in a cause, is not disqualified to hear it on appeal, under the act of congress. — *Smith v. Wingard*, S. C. Wash. Ter., Jan. 21, 1887; 14 Pac. Rep. 596.

190. SURETY—Note Given as Collateral—Recital.—— Circumstances stated under which certain notes given by the individuals as collateral security for the note of a corporation became absolute. Effect of recitals.—*Street v. Old Town Bank*, Md. Ct. App., June 22, 1887; 10 Atl. Rep. 319.

191. TAXATION — Bonds — City Charter — Mayor—Employing Counsel.——Where by city charter the rate of taxation to provide for its bonds given to aid a railroad is fixed, as long as such taxes are needed, in case the city council fails to fix a rate, the assessor can levy such taxes under the charter, on failure of the council to act, till the debt is paid. The mayor, believing such tax to be illegal, can in good faith employ counsel at the city's expense to resist such action.—*City of Louisville v. Murphey*, Ky. Ct. App., June 18, 1887; 5 S. W. Rep. 194.

192. TAXATION — Certiorari. —— A proceeding by *certiorari* to review the action of the tax assessors in refusing to exempt certain property, must be under the New York act of 1880.—*People v. Assessors of Greensburgh*, N. Y. Ct. App., July 1, 1887; 12 N. E. Rep. 794.

193. TAXATION—Ground Rents—Statute.——The funds of saving banks in Maryland, which are invested in ground rents of land of which the whole taxes are assessed to and paid by the owners, are not taxable. Construction of Maryland statutes on the subject.—*State v. Central, etc. Bank*, Md. Ct. App., June 21, 1887; 10 Atl. Rep. 290.

194. TAXATION — Mortgage—Non-resident.——A loan on real estate, secured by a mortgage, belonging to a non-resident, is not taxable, though a local agent collects the interest and is to receive the principal when due.—*Myers v. Seaberger*, S. C. Ohio, June 7, 1887; 12 N. E. Rep. 796.

195. TAXATION — Municipal Corporation—Boundaries. ——Commissioners appointed to lay off a town are presumed to do their duty. If one of the boundary lines is an unnavigable river, the line must follow the rule of private surveys and be the middle of the stream; hence a bridge across such a stream is within the limits of the town and taxable.—*State ex rel. v. City of Columbia*, S. C. S. Car., July 8, 1887; 3 S. E. Rep. 55.

196. TRADE-MARK.——A trade-mark cannot be obtained for the form of the sticks in which chewing-gum is made, nor for the peculiar shape and decorations of the boxes into which it is put for the market, nor for the manner in which the gum is arranged in the boxes. —*Adams v. Heisel*, U. S. C. C. (Ohio), April Term, 1887; 31 Fed. Rep. 279.

197. TRIAL—Constitutional Law—Appeal—Exception—Limitation—Pleading.——A judge may in his charge to the jury constitutionally state what the witnesses testified. A verdict will not be disturbed by an appellate court on a general exception that the account was not proved according to the rules of evidence. What is the proper mode of pleading the statute of limitations?—*Walker v. Larrey*, S. C. S. Car., July 9, 1887; 3 S. E. Rep. 63.

198. TUG AND TOW—Lake Champlain.——It is the duty of tugs taking very long tows on Lake Champlain to take special precautions against the damages incident to the practice. For want of such precautions the owners will be held liable.—*O'Brien v. New York, etc. Co.*, U. S. D. C. (N. Y.), May 18, 1887; 31 Fed. Rep. 494.

199. WILL — Construction — Money — After-acquired Land.——A provision in a will devising real and personal estate, that, if there is any money remaining after my death it shall be equally divided, refers to all the personal estate. Land acquired by the exchange of land specifically devised goes to the residuary legatee, when the will discloses no intent to omit from its operation after-acquired land.—*Decker v. Decker*, S. C. Ill., June 20, 1887; 12 N. E. Rep. 750.

200. WITNESS — Disqualification — Foreign Judgment. ——To disqualify a witness, under Texas law, because he was convicted upon information of forgery in the second degree in another State and sentenced to the penitentiary, it must be shown that in that State forgery is a felony and can be prosecuted by information. —*Petner v. State*, Tex. Ct. App., May 21, 1887; 5 S. W. Rep. 210.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERY NO. 12.

A note given as follows:

$100. C——, July 1, 1886.

One year after date I promise to pay to the order of John Smith, one hundred dollars, value received.

JOHN DOE.

Indorsed as follows:

"Bennington Life Ins. Co.,
By John Smith, President."

Is the above indorsement sufficient to pass title, and will transfer for value before maturity cut off quities?

QUERY NO. 13.

A suit is brought in 1884 to foreclose a mortgage which would be barred by the statute of limitations in 1886. When the suit was brought the grantee of the mortgagor who occupied the premises only was made party defendant. The suit was not pressed to trial until after the mortgage was barred by the statute of limitations, after which and before judgment the mortgagee applied to be made a party to the suit, and was so made a party by order of the court. Can he now successfully set up the statute of limitations as a defense and defeat the suit so as to prevent a sale o the mortgagee's premises? S. S. B.

QUERIES ANSWERED.

QUERY NO. 11 [*25 Cent. L. J. 240.*]

A sells a tract of land to B, giving him a quitclaim deed; at the time he sells it there is a judgment against A and the land for taxes. After the sale to B the land is sold at tax sale under said judgment, and A buys it. Will A's title be good? R.

Answer. One whose duty it is to pay the taxes can acquire no title by purchase at a sale for those taxes. Moss v. Shear, 25 Cal. 38; Douglas v. Dangerfield, 10 Ohio, 152; Bassett v. Welch, 22 Wis. 175; Jones v. Davis, 24 Wis. 229; Blackwell on Tax Titles, 399. Such duty may be to the State. Blackwood v. Van Vliet, 30 Mich. 118; also *supra*. A's title is bad, but to avoid any question growing out a transfer by A, it would be well for B to have A's deed judicially declared void. M.

QUERY NO. 8 [*25 Cent. L. J. 165.*]

A gives to B ten negotiable promissory notes all dated Jan. 1, 1887, and reciting on the face of some that they are secured by a deed of trust. The notes are due in installments of $30.00 every six months. One of the conditions of the deed of trust is that if default is made in the payment of any note when it becomes due then all shall become due and payable. Default has been made in the payment of the note due July 1, 1887. Now the question is, can suit be maintained on the nine notes, that are not yet due on their face? I do not care to sell under deed of trust nor to foreclose, as I want to get judgment at first term if I can. My idea is to file deed, trust and notes with my petition and plead the condition of the deed of trust. Are the notes due for this purpose under Missouri law? Cite authorities. B.

Answer. The notes only mature to enable the trustee to apply the proceeds of the sale to their liquidation. Suit cannot be brought upon them till they mature, as expressed on the face of each note. Morgan v. Martieu, 32 Mo. 438. P. S.

Another Answer. The case of Noell v. Gaines, 68 Mo. 649, has never been overruled and is undoubtedly the law in this State—the only contrary doctrine expressed since then is in Philips v. Bailey, 82 Mo. 639. Judges Brewer and Treat, of United States Circuit Court, eastern district of Missouri, in an opinion on file assented to the ruling of Noell-Gaines' case, holding that for purposes of collection the deed of trust and notes constituted but one contract to be read together, and upon default in the payment of the first note the subsequently maturing notes became at once due and payable. Wheeler & W. M'f'g Co. v. Howard, decided in 1886. M. W. H.

QUERY No. 10 [*25 Cent. L. J. 216.*]

February 1, 1883, A bought of B (a corporation in Illinois) a steam thresher, giving his note of $500 in payment, due two years after date. A few days after date of note A transferred to C the thresher with the parol promise on the part of C that C would pay the said note. To induce A to do this, C paid A ten dollars. After due, B wrote to C that if the principal alone were paid the note would be cancelled. Acting on this offer, C borrowed of D $500, and gave his note to D, with E and F as securities. At C's request D paid the $500 to E. E went to G, the attorney of B, who had the note for collection, and desired to buy the note for $500. G wrote to B and got authority from the treasurer of B to indorse the note without recourse for $500, which was done, B's name being signed by G, attorney; after this E brought suit against A to collect the note with interest. What defense has A in this action? Please cite authorities.

R. B. D.

Answer. The note of A became C's debt. E, as the agent of C, received C's money to pay C's debt, but claims to have bought the evidence of the debt for himself, using C's money, and is now trying to enforce it against one, whom C is bound to protect. E has no right of action. *Ex dolo malo non oritur actio.* An agent, or any one in a fiduciary position, making a profit by violation of his instructions, is not allowed to retain it, but it goes to his principal. Story on Agency, §§ 192, 207; 2 Story Eq. Juris., §§ 1261, 1262. Upon purchase by E, the note became the property of C. The note being paid by C was thereby cancelled. 2 Danl. Neg. Inst. § 1236. Upon proof of the facts, the suit will be dismissed.

E. S.

RECENT PUBLICATIONS.

THE PRINCIPLES AND FORMS OF PRACTICE IN CIVIL ACTIONS in Courts of Record under the Codes of Procedure, Adapted also to Common Law and Equity Practice. By Austin Abbott, of the New York Bar. "Forms Repay the Close Attention of Counsel as well as of Attorney and Clerk. They are not Merely Weapons of Contest; Whatever is Said the Form Alone Remains to Show what was Done." Vol. I. New York: Baker, Voorhis & Co., Law Publishers, 66 Nassau St. 1887.

This is the first, of two volumes, of a work which will no doubt prove very useful to practitioners in all the code States. It has manifestly been prepared with great care, and the arrangement of the work in chapters, articles and sections is unexceptionable. The forms, which are very abundant, are put, as they should be, in their appropriate places in the text, instead of being collected in a heterogeneous mass in an appendix stuck in at the end of the volume according to the practice adopted in many books of a similar character.

The author well expresses the character and object of his work in his preface. He says: "What is needed in a book of practice is not so much a survey of general principles, nor a compend of authorities, as a practical statement of the existing powers and usages of the courts in each of the various stages of litigation, * * * as they are seen, so to speak, in motion, in the actual litigation of to-day."

This volume has no index or table of cases, and that omission, in our judgment, is a defect which will, however, be cured by the appearance of the second volume, with the general index; we must say, however, that we prefer to see a separate index to each volume, although that is not the usual practice.

JETSAM AND FLOTSAM.

COUNSEL for the defense (to his wife): "My dear, I want you to lock up everything that is movable in our house." Wife: "Why so?" Counsel: "The thief who was acquitted this morning without a stain on his character, owing to my brilliant defense, is coming this afternoon to thank me."

EARNED HIS MONEY.—"It will be a hundred dollars in your pocket if the jury brings in a verdict of manslaughter," said the prisoner's counsel to an unscrupulous juror. "All right," responded the juror.

The verdict of guilty of manslaughter was returned and the hundred dollars was duly paid.

"I earned that money, sure," said the juror as he pocketed it. "I had a devil of a time to persuade them to do it. They all wanted to acquit him."

A YOUNG lawyer employed to defend a culprit charged with stealing a pig, resolved to convince the court that he was born to shine. Accordingly, he proceeded to deliver the following brilliant exordium: "May it please the court and gentlemen of the jury, while Europe is bathed in blood; while classic Greece is struggling for her rights and liberties, and trampling the unhallowed altars of the bearded infidels to dust; while America shines forth the brightest orb in the political sky—I, with due diffidence, rise to defend the cause of this humble hog-thief."

A GEORGIA magistrate was perplexed by the conflicting claims of two negro women for a baby, each contending that she was the mother of it. The judge remembered Solomon, and, drawing a bowie-knife from his boot, declared that he would give half to each. The women were shocked, but had no doubt of the authority and purpose of the judge to make the proposed compromise. "Don't do that, boss," they both screamed in unison. "You can keep it yourself."—*Criminal Law Magazine.*

ROSEBUDS IN A DIVORCE SUIT.—The dreary monotony of a divorce case was dragging its soiled length along in Judge Hick's court yesterday. The woful contestants were listening eagerly, when a handsome, broad-shouldered youth entered the room with a young lady on his arm. He was overflowing with joy. His face was constantly wreathed in smiles which seemed to fill the gloomy court room. She was happy, too; bashfully, surreptitiously happy, and she looked shyly from behind her stalwart lover's arm.

They wanted to be married. The divorce suit was suspended at once, for the court will stop unmaking a marriage to make one any time. The ceremoney was performed. The young man drew out a $5 bill and placed it before the judge. With his brightest smile and a speech as gallant as a Chesterfield could make, he presented it to the bride. The little lady accepted the money, and with a quick, graceful movement, she drew the boquet of roses from her bosom and placed it before the judge. With a bow he received the rosebuds, and a few minutes later he returned to the divorce suit, but the sweet odor pervaded the dingy court room all that day.